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VOLUME 391

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1967

MAY 6 THROUGH JUNE 7, 1968

HENRY PUTZEL, jr.
REPORTER OF DECISIONS

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ERRATUM.

389 U. S. 258, line 5 of syllabus: "Petitioner" should be "Appellee."

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

EARL WARREN, CHIEF JUSTICE.
HUGO L. BLACK, ASSOCIATE JUSTICE.
WILLIAM O. DOUGLAS, ASSOCIATE JUSTICE.
JOHN M. HARLAN, ASSOCIATE JUSTICE.
WILLIAM J. BRENNAN, JR., ASSOCIATE JUSTICE.
POTTER STEWART, ASSOCIATE JUSTICE.
BYRON R. WHITE, ASSOCIATE JUSTICE.
ABE FORTAS, ASSOCIATE JUSTICE.
THURGOOD MARSHALL, ASSOCIATE JUSTICE.

RETIRED.

STANLEY REED, ASSOCIATE JUSTICE.
TOM C. CLARK, ASSOCIATE JUSTICE.

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392757

SUPREME COURT OF THE UNITED STATES.

ALLOTMENT OF JUSTICES.

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, viz.:

For the District of Columbia Circuit, EARL WARREN, Chief Justice.

For the First Circuit, ABE FORTAS, Associate Justice.

For the Second Circuit, JOHN M. HARLAN, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, EARL WARREN, Chief Justice.

For the Fifth Circuit, HUGO L. BLACK, Associate Justice.

For the Sixth Circuit, POTTER STEWART, Associate Justice.

For the Seventh Circuit, THURGOOD MARSHALL, Associate Justice.

For the Eighth Circuit, BYRON R. WHITE, Associate Justice.

For the Ninth Circuit, WILLIAM O. DOUGLAS, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

October 9, 1967.

(For next previous allotment, see 382 U. S., p. v.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1967.

MATHIS *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 726. Argued April 2–3, 1968.—Decided May 6, 1968.

Petitioner, who was in a state prison, was questioned by an Internal Revenue Service investigator about certain tax returns in a "routine tax investigation," without any warnings that any evidence he gave could be used against him, that he had a right to remain silent, and a right to counsel, or that one would be appointed for him if he was unable to afford counsel. Documents and oral statements obtained from petitioner were introduced in his criminal trial for filing false claims for tax refunds. He was convicted and his conviction was affirmed by the Court of Appeals. *Held:* Pursuant to *Miranda* v. *United States*, 384 U. S. 456 (1966), petitioner was entitled to warnings of his right to be silent and right to counsel. Tax investigations, which frequently lead to criminal prosecution, are not immune from the *Miranda* warning requirement to be given to a person in custody, whether or not such custody is in connection with the case under investigation. Pp. 3–5.

376 F. 2d 595, reversed and remanded.

Nicholas J. Capuano, by appointment of the Court, 389 U. S. 966, argued the cause and filed a brief for petitioner.

Daniel M. Friedman argued the cause for the United States. On the brief were *Solicitor General Griswold, Assistant Attorney General Rogovin,* and *Joseph M. Howard.*

MR. JUSTICE BLACK delivered the opinion of the Court.

Petitioner was convicted by a jury in a United States District Court on two counts charging that he knowingly filed false claims against the Government in violation of 18 U. S. C. § 287 [1] and sentenced to 30 months' imprisonment on each count, the sentences to run concurrently. The frauds charged were claims for tax refunds growing out of petitioner's individual income taxes for 1960 and 1961. Both income tax returns for these two years asserted receipts of income from two different companies which the government agents were unable to locate and which evidence offered tended to show were nonexistent. The amount of income claimed in each tax return was calculated in such a way as to show that these two nonexistent employers had withheld taxes sufficient to justify substantial refunds to petitioner. The Government paid the 1960 tax refund to petitioner of $885.60 as claimed, but the record fails to show whether the 1961 claimed refund was paid. A part of the evidence on which the conviction rested consisted of documents and oral statements obtained from petitioner by a government agent while petitioner was in prison serving a state sentence. Before eliciting this information, the government agent did not not warn petitioner that any evi-

[1] 18 U. S. C. § 287 provides: "Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

dence he gave the Government could be used against him, and that he had a right to remain silent if he desired as well as a right to the presence of counsel and that if he was unable to afford counsel one would be appointed for him. At trial petitioner sought several times without success to have the judge hold hearings out of the presence of the jury to prove that his statements to the revenue agent were given without these warnings and should therefore not be used as evidence against him. For this contention he relied exclusively on our case of *Miranda* v. *Arizona*, 384 U. S. 436 (1966). The District Court rejected this contention as did the Court of Appeals in affirming. 376 F. 2d 595. We granted certiorari to decide whether the *Miranda* case calls for reversal. We hold that it does.

There can be no doubt that the documents and oral statements given by petitioner to the government agent and used against him were strongly incriminating.[2] In the *Miranda* case this Court's opinion stated at some length the constitutional reasons why one in custody who is interrogated by officers about matters that might tend to incriminate him is entitled to be warned "that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him

[2] Internal Revenue Agent Lawless testified that on October 30, 1964, he interviewed petitioner in the Florida State Penitentiary to determine if the 1960 return had been prepared by petitioner and to obtain petitioner's consent in writing to extend the statute of limitations on the 1960 return. At this interview petitioner identified the 1960 tax return and the signature thereon as his; he also signed the extension form. Again on March 2, 1965, Agent Lawless interviewed petitioner at the penitentiary, and this time petitioner identified the 1961 tax return and signature thereon as his and signed an extension form for this return.

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prior to any questioning if he so desires." 384 U. S., at 479. The Government here seeks to escape application of the *Miranda* warnings on two arguments: (1) that these questions were asked as a part of a routine tax investigation where no criminal proceedings might even be brought, and (2) that the petitioner had not been put in jail by the officers questioning him, but was there for an entirely separate offense. These differences are too minor and shadowy to justify a departure from the well-considered conclusions of *Miranda* with reference to warnings to be given to a person held in custody.

It is true that a "routine tax investigation" may be initiated for the purpose of a civil action rather than criminal prosecution. To this extent tax investigations differ from investigations of murder, robbery, and other crimes. But tax investigations frequently lead to criminal prosecutions, just as the one here did. In fact, the last visit of the revenue agent to the jail to question petitioner took place only eight days before the full-fledged criminal investigation concededly began. And, as the investigating revenue agent was compelled to admit, there was always the possibility during his investigation that his work would end up in a criminal prosecution. We reject the contention that tax investigations are immune from the *Miranda* requirements for warnings to be given a person in custody.

The Government also seeks to narrow the scope of the *Miranda* holding by making it applicable only to questioning one who is "in custody" in connection with the very case under investigation. There is no substance to such a distinction, and in effect it goes against the whole purpose of the *Miranda* decision which was designed to give meaningful protection to Fifth Amendment rights. We find nothing in the *Miranda* opinion which calls for a curtailment of the warnings to be given persons

under interrogation by officers based on the reason why the person is in custody. In speaking of "custody" the language of the *Miranda* opinion is clear and unequivocal:

> "To summarize, we hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized." 384 U. S., at 478.

And the opinion goes on to say that the person so held must be given the warnings about his right to be silent and his right to have a lawyer.

Thus, the courts below were wrong in permitting the introduction of petitioner's self-incriminating evidence given without warning of his right to be silent and right to counsel. The cause is reversed and remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

MR. JUSTICE WHITE, with whom MR. JUSTICE HARLAN and MR. JUSTICE STEWART join, dissenting.

I dissented from the Court's decision in *Miranda* v. *Arizona*, 384 U. S. 436 (1966), because I thought that the Court had accepted an interpretation of the Fifth Amendment having "no significant support in the history of the privilege or in the language of the Fifth Amendment," 384 U. S., at 526, and because I disagreed with the Court's "assessment of the [new] rule's consequences measured against community values," 384 U. S., at 537. I continue to believe that the decision in *Miranda* was an extravagant and unwise interpretation of the Fifth Amendment, and I would prefer that *Miranda* be aban-

doned, thus avoiding the reversal of this criminal conviction because of introduction at trial of statements by the petitioner that were unquestionably voluntary by traditional standards but were made without the petitioner's having received the so-called *Miranda* warnings.

However, even were I to agree that *Miranda* was correctly decided, I would not join the unexplained extension which the Court gives *Miranda* in this case. At issue are two questions[1] asked of petitioner by an Internal Revenue agent in the course of a civil investigation. The interview was indistinguishable from the thousands of inquiries into tax liability made annually as a necessary adjunct to operation of our tax system. The Court said in *Miranda* that "proper safeguards" were needed for "in-custody interrogation of persons suspected or accused of crime," 384 U. S., at 467. In this case the majority states that criminal investigation of Mathis began soon after the second of the visits to him of Revenue Agent Lawless. This suggests a view, unsupported by the record before us, that the civil investigation had raised suspicions of criminal conduct by Mathis at the time of this visit.[2] However, the majority also says that "tax investigations frequently lead to criminal prose-

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[1] Petitioner was asked whether tax returns received by the Government bearing his name had in fact been prepared by him and whether he would consent to an extension of the statute of limitations for causes of action arising from those returns.

[2] A civil investigator is required, whenever and as soon as he finds "definite indications of fraud or criminal potential," to refer a case to the Intelligence Division for investigation by a different agent who works regularly on criminal matters. In the case before us, such a reference was made eight days after the second visit to petitioner by Agent Lawless. The criminal agent visited petitioner, gave him the full set of "*Miranda* warnings," and was told petitioner did not wish to discuss the case with him. No further questions were asked.

cutions," a hint that any in-custody questioning by an employee of the Government must be preceded by warnings if it is within the immensely broad area of investigations which "frequently lead" to criminal inquiries. Fortunately, voluntary compliance with civil regulation is widespread in this country. Nevertheless, compliance must be supplemented and encouraged by constant and widespread investigations, during which questions are asked and data are requested by employees of the Government whose goal is only to settle fairly the civil accounts between the United States and its citizens. Sometimes, of course, the possibility of a criminal violation is discovered through such inquiries. I had not thought that *Miranda* extended its checklist of warnings to these civil investigations. Certainly the explanation of the need for warnings given in the *Miranda* opinion does not cover civil investigations, and the Court's opinion in this case furnishes no additional support.

The Court is equally cavalier in concluding that petitioner was "in custody" in the sense in which that phrase was used in *Miranda*. The State of Florida was confining petitioner at the time he answered Agent Lawless' questions. But *Miranda* rested not on the mere fact of physical restriction but on a conclusion that coercion—pressure to answer questions—usually flows from a certain type of custody, police station interrogation of someone charged with or suspected of a crime. Although petitioner was confined, he was at the time of interrogation in familiar surroundings. Neither the record nor the Court suggests reasons why petitioner was "coerced" into answering Lawless' questions any more than is the citizen interviewed at home by a revenue agent or interviewed in a Revenue Service office to which citizens are requested to come for interviews. The

rationale of *Miranda* has no relevance to inquiries conducted outside the allegedly hostile and forbidding atmosphere surrounding police station interrogation of a criminal suspect. The Court's willingness to reverse without explaining why the reasons given for the *Miranda* decision have any relevance to the facts of this case is deeply troubling.

Syllabus.

FEDERAL POWER COMMISSION *v.* SUNRAY DX OIL CO. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 60. Argued January 22–23, 1968.—Decided May 6, 1968.*

The Federal Power Commission (FPC) has decided to rely on area rate proceedings to establish just and reasonable rates for producer sales under §§ 4 and 5 of the Natural Gas Act. Pending completion of those proceedings the FPC has rested interim producer regulation on § 7. Under that section, natural gas may be sold only pursuant to an FPC certificate of public convenience and necessity, which under § 7 (e) may be conditioned "in such manner as the public convenience and necessity may require." In *Atlantic Rfg. Co.* v. *Public Serv. Comm'n (CATCO)*, 360 U. S. 378, this Court held that the FPC should use its § 7 conditioning power to prevent large initial contract price advances, pending the determination under §§ 4 and 5 of just and reasonable rates, which would become effective only prospectively. The FPC thereafter began to use its conditioning power to determine maximum initial prices at which sales could occur, basing these "in-line" prices upon current prices in the area of the proposed sale but excluding current prices which for various reasons were "suspect." In *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U. S. 223, this Court generally approved this regulatory approach, holding that the FPC might properly refuse to hear cost evidence in such "in-line" price proceedings, and that

*Together with No. 61, *United Gas Improvement Co.* v. *Sunray DX Oil Co. et al.*, No. 62, *Brooklyn Union Gas Co. et al.* v. *Federal Power Commission et al.*, No. 80, *Federal Power Commission* v. *Standard Oil Co. of Texas, a Division of Chevron Oil Co., et al.*, and No. 97, *United Gas Improvement Co.* v. *Sunray DX Oil Co.*, also on certiorari to the same court; No. 111, *Shell Oil Co.* v. *Public Service Commission of New York*, No. 143, *Skelly Oil Co. et al.* v. *Public Service Commission of New York et al.*, No. 144, *Federal Power Commission* v. *Public Service Commission of New York et al.*, and No. 231, *Superior Oil Co.* v. *Federal Power Commission et al.*, on certiorari to the United States Court of Appeals for the District of Columbia Circuit.

when issuance of permanent certificates was held erroneous on judicial review, the FPC might on remand impose new certificate conditions for refunds of amounts previously collected above the subsequently determined in-line price. On September 28, 1960, the FPC began its post-*CATCO* regulation of sales in Texas Railroad Commission Districts 2, 3, and 4, the three Texas Gulf Coast districts which are involved in these proceedings, by issuing its General Policy Statement, announcing a guideline ceiling price for new sales in each district of 18¢ per Mcf. On March 23, 1964, at the conclusion of the District 4 (*Amerada*) proceeding, the FPC determined an in-line price of 16¢ per Mcf for sales contracted after the issuance of the Policy Statement. The FPC relied primarily on a comparison of prices in contracts entered into since the Policy Statement and during the preceding two years. The FPC noted that 82% of post-Policy Statement sales were at 16¢ or more per Mcf. It gave "some measure of weight" to its 18¢ Policy Statement guideline price. Some weight was also accorded to prices under temporary certificates because only 1.4% of the gas in the area was moving under permanent certificates, though the FPC was mindful that the temporary prices were "suspect" and took their unreliability into account when it rejected the 17.2¢ average contract price. The FPC's conditional certification of proposed sales in District 4 was appealed to the Court of Appeals for the Tenth Circuit. That court upheld the FPC's price line against contentions by certain consumers and distributors (the "seaboard interests") that the 16¢ price was too high and that in fixing that price the FPC erred in taking account of prices at which gas had been sold under temporary certificates. On September 22, 1965, the FPC issued its in-line price orders in the District 2 (*Sinclair*) and District 3 (*Hawkins*) proceedings reaffirming an earlier established price of 16¢ for the pre-Policy Statement period in District 3, and for the later period fixing a 16¢ price in District 2 and 17¢ in District 3. In fixing the 16¢ District 2 price the FPC gave full weight to the permanently certificated prices at which about 40% of the gas in the area was then moving; some but "not undue" force to the temporary prices at which 60% of the gas currently flowed; accorded "some weight" to the original, unconditioned prices in the area and to the 16¢ volumetric median and 15.29¢ volumetric weighted average prices for post-Policy Statement sales; and recognized that 53% of the gas in the area was moving at prices at or below 16¢. In fixing the 16¢ District 3 price the FPC gave full force to permanently certificated sales of small volumes of gas below 16¢ and comparatively large volumes

at 16¢ and 16.2¢; considered the fact that a little less than half the total volume of gas was sold at 16¢ or less; gave "some weight" to permanently certificated sales of very large volumes at 17.5¢ or above (even though those were regarded as "suspect" prices); and apparently considered the weighted average price of 15.16¢ for all except the latter suspect sales. In fixing the 17¢ District 3 price the FPC gave full weight to the permanently certificated sales of moderate volumes of gas at 15¢ and 16.2¢, a small volume at 16.5¢, and large volumes at 18¢; gave "some weight" to temporary prices; noted that the 17¢ price reflected the weighted average of 16.17¢ for permanently certificated sales; accorded some weight to original, unconditioned prices in the area; and considered the fact that 43% of all permanently certificated area sales were at or above 17¢. The FPC's orders conditionally certificating the proposed sales in Districts 2 and 3 were appealed together to the Court of Appeals for the District of Columbia Circuit, which sustained the seaboard interests' contention that the post-Policy Statement prices for Districts 2 and 3 were too high and that the FPC erred in considering temporary and unconditioned prices. It rejected Superior Oil Company's contention that the initial prices in District 3 for both pre- and post-Policy Statement periods were too low, Superior having urged that the FPC erroneously excluded from consideration nine large-volume sales at 20¢ per Mcf when it set the 16¢ price in District 3; that in fixing the initial prices the FPC erroneously excluded a number of 1955–1956 sales at 17.5¢ to Coastal Transmission Company; that with respect to both time periods the FPC erroneously failed to consider prices embodied in settlement orders; that the FPC failed to take enough notice of temporary prices and refused to consider prices of intrastate sales; and that for both periods the FPC had incorrectly relied on estimated rather than actual volumes of gas sold. The FPC did not expressly consider whether any of the "in-line" prices it fixed were suitable when regarded as refund floors, *i. e.*, a level below which the FPC may not order refunds pursuant to § 4 (e) of the Natural Gas Act. Most of the producers in the District 4 proceeding had applied for and been granted temporary certificates under § 7 (c) of the Act, those certificates authorizing them to sell gas at or below 18¢ per Mcf, the then-guideline price. Eight certificates provided for refunds should the eventual in-line price be lower than that charged under the temporary certificate; the other certificates contained only general cautionary language respecting further FPC action. The FPC ultimately ordered the District 4 producers to refund sums collected under the temporary

certificates in excess of the in-line rate. The Court of Appeals for the Tenth Circuit held that the FPC lacked power to order refunds of amounts collected under unconditioned temporary certificates, reasoning that to permit such refunds would undermine producer confidence and destroy stability. In the District 2 and District 3 proceedings the New York Public Service Commission contended that there was no public need for the gas and alleged that several pipelines were already obligated by contract either to take more gas than they could foreseeably use or to pay for it. The FPC refused to give more than perfunctory consideration to this "need" issue, which it concluded should be dealt with in pipeline rather than producer proceedings. The Court of Appeals for the District of Columbia Circuit held that the FPC erred in not meeting the need issue in the producer certification proceeding. *Held:*

1. The post-Policy Statement period initial price of 16¢ per Mcf in District 4 was not based on impermissible factors and was not unreasonable. Pp. 28–30.

(a) The FPC did not abuse its discretion in giving some weight to the guideline and temporary prices (especially since 98.6% of the gas was flowing under temporary certificates), since both those types of prices, like permanently certificated prices, give some indication of cost trends. P. 29.

(b) The 16¢ price, which was at the lower end of the spectrum of current prices considered by the FPC, was within the "zone of reasonableness" within which the FPC has rate-setting discretion, and satisfied the *CATCO* mandate against abrupt price rises. Pp. 29–30.

2. The FPC did not abuse its discretion in establishing the in-line prices in Districts 2 and 3. Pp. 32–36.

(a) The FPC's consideration of temporary and unconditioned contract prices was proper. P. 32.

(b) The 16¢ and 17¢ initial prices were within the "zone of reasonableness" and did not breach the *CATCO* directive. P. 32.

(c) The FPC properly discounted the force of the 20¢ sales which were out of line with respect to the post-*CATCO* price structure and which the FPC had reason to believe would have been set aside on judicial review had it not been for a procedural defect. P. 34.

(d) The prices to Coastal Transmission Company (a pipeline company which at the time of the sales did not have a certificate

and was not yet in operation) were properly discounted by the FPC, as those prices may have included a higher-than-normal allowance for risk. Pp. 34–35.

(e) The FPC had discretion to disregard the prices embodied in the settlement orders as not supplying independent evidence of market trends. P. 35.

(f) The FPC gave adequate consideration to temporary prices, and it properly rejected evidence of intrastate prices as not covering the entire area or being representative. P. 35.

(g) Actual volumes of gas sold during 1962 and 1963 were not known and FPC's reliance on estimated volumes was therefore justified. Pp. 35–36.

3. An in-line price is a "refund floor" below which the FPC may not order refunds under § 4 (e) of the Natural Gas Act. Pp. 22–24.

4. The in-line prices fixed here were not impermissibly high when viewed as refund floors. Pp. 36–40.

(a) Though it was regrettable that the FPC did not explicitly consider whether or not the in-line prices it fixed were suitable when regarded as refund floors, it was not obliged in this instance to do so. See *Callery, supra.* P. 37.

(b) The 16¢ price in the District 4 proceeding was not beyond the FPC's power when viewed as a refund floor since it was near the lower end of the price range suggested by the price evidence. P. 38.

(c) The 16¢ price in the District 2 proceeding and the 17¢ price in the similar District 3 proceeding (neither of which is likely to exceed the probable Texas Gulf Coast area rate) were within the FPC's authority when viewed as refund floors; despite the weaknesses in the FPC's opinion with respect to these aspects, it is desirable to terminate this protracted and outmoded proceeding. Pp. 39–40.

5. In the exercise of its power to condition permanent certificates under § 7 (e), the FPC may require producers to refund amounts collected under outstanding, unconditioned temporary certificates in excess of the finally established in-line price. Pp. 43–45.

(a) Parties, at least those other than the producer itself, may challenge a temporary certificate at the time a permanent certificate is applied for, notwithstanding the time limits on appeal set out in § 19 (b) of the Act. Pp. 43–44.

(b) To hold that refunds could not be ordered for the interim period on the ground urged by the producers that a temporary certificate creates vested rights which may be altered only prospectively would contravene the objectives of the Natural Gas Act. P. 44.

(c) When a producer, due to an emergency, has requested permission to deliver gas before normal certification procedures are completed, it is not unfair in return for that permission that when those procedures are terminated the producer's terms may be retrospectively altered to conform to the public interest. Pp. 44–45.

6. Neither the procedure followed nor the result reached by the FPC in ordering refunds constituted an abuse of discretion because of the particular circumstances of the *Amerada* proceeding. Pp. 45–47.

7. The FPC did not abuse its discretion in deciding that the question whether the gas to be sold is actually needed by the public can be better dealt with in pipeline rather than producer proceedings. Pp. 47–52.

(a) Data about the purchasing pipeline's total gas supply, its take-or-pay situation under outstanding sales contracts, the purchasing pipeline's customers and the alternative uses for gas by other pipelines which might buy it are not in the producers' but in the pipelines' possession. P. 49.

(b) The pipeline proceedings, supplemented by other forms of regulation available to the FPC, will, so far as appears from the present record, provide an adequate forum in which to confront both the take-or-pay and end-use aspects of the need issue. Pp. 50–52.

Nos. 60, 61, and 62, 370 F. 2d 181, affirmed in part, reversed in part; Nos. 80 and 97, 376 F. 2d 578, and Nos. 111, 143, 144, and 231, 126 U. S. App. D. C. 26, 373 F. 2d 816, reversed.

Peter H. Schiff argued the cause for the Federal Power Commission. With him on the brief were *Solicitor General Griswold, Ralph S. Spritzer, Harris Weinstein, Richard A. Solomon,* and *Joel Yohalem.*

William T. Coleman, Jr., and *Morton L. Simons* argued the cause for the Public Service Commission of New York et al. (Consumer-Distributor Group). With *Mr. Coleman* on the briefs for the United Gas Improvement

Co. were *Robert W. Maris, Richardson Dilworth,* and *Harold E. Kohn.* With *Mr. Simons* on the briefs for the Consumer-Distributor Group were *Samuel Graff Miller, Kent H. Brown, Edwin F. Russell, Barbara M. Suchow, Bertram D. Moll,* and *Barbara M. Simons.*

William K. Tell, Jr., Thomas G. Johnson, William T. Kilbourne II, Francis H. Caskin, and *Justin R. Wolf* argued the cause for the Sunray DX Oil Co. et al. (Producers). With *Messrs. Tell* and *Caskin* on the briefs for the Sunray DX Oil Co. et al. were *Homer E. McEwen, Jr., William R. Slye, James D. Annett, Phillip D. Endom, Robert E. May, Richard F. Remmers, Kiel Boone, Martin N. Erck, Frank S. Troidl, Thomas G. Crouch, Robert W. Henderson, Donald K. Young, Warren M. Sparks, Sherman S. Poland, Robert V. Smith, Vernon W. Woods, J. Evans Attwell,* and *W. H. Drushel, Jr.* With *Mr. Johnson* on the briefs for the Shell Oil Co. et al. were *Messrs. Erck, Troidl, Poland, Bernard A. Foster, Jr.,* and *Oliver L. Stone.* With *Mr. Kilbourne* on the briefs for the Superior Oil Co. were *Murray Christian, H. W. Varner,* and *Homer J. Penn.* With *Mr. Wolf* on the briefs for the Standard Oil Co. of Texas were *Francis R. Kirkham* and *Louise C. Powell.*

J. P. Hammond, Harold H. Young, Jr., Wm. J. Grove, Carroll L. Gilliam, and *Phillip R. Ehrenkranz* filed a brief for the Pan American Petroleum Corp., as *amicus curiae.*

MR. JUSTICE HARLAN delivered the opinion of the Court.

These cases present questions arising out of the issuance by the Federal Power Commission, pursuant to § 7 of the Natural Gas Act, 52 Stat. 824, as amended, 15 U. S. C. § 717f, of "permanent" certificates authorizing producers to sell natural gas to pipelines for transportation and resale in interstate commerce.

An understanding of the issues requires some background. Section 7 (c) of the Natural Gas Act provides that a natural gas company may engage in a sale of natural gas subject to the Commission's jurisdiction only if it has obtained from the Commission a certificate of public convenience and necessity. Such a "permanent" certificate may issue only after notice and hearing to interested parties, although a proviso to § 7 (c) enables the Commission in cases of emergency to issue temporary certificates without notice and hearing, pending the determination of an application for a permanent certificate. Section 7 (e) states that permanent certificates are to be granted if, and only if, the Commission finds that the proposed sale "is or will be required by the present or future public convenience and necessity . . . ." That section further provides that the Commission may attach to certificates "such reasonable terms and conditions as the public convenience and necessity may require."

Prior to 1954, the Commission construed the Natural Gas Act as empowering it to regulate only sales of gas by pipelines and not sales by producers. This Court held to the contrary in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672. Since then, the Commission has been engaged in a continuing effort to adapt the provisions of the Act to regulation of producer sales. The method finally resolved upon for determining the "just and reasonable" rate at which § 4 of the Act requires that natural gas be sold was to conduct a number of area rate proceedings, looking to the establishment of maximum producer rates within each producing area. This method of regulation has recently been approved by us in the *Permian Basin Area Rate Cases*, 390 U. S. 747. Other area rate proceedings are underway, and they will eventually encompass areas accounting for some 90% of all the gas sold in interstate commerce. See *id.*, at 758, n. 18.

The decision to rely on area rate regulation as the means for establishing just and reasonable rates under §§ 4 and 5 of the Act, and its implementation, have thus far occupied more than a decade. During this period, the Commission was obliged to rest interim producer rate regulation on § 7. In the early years following this Court's first *Phillips* decision, *supra*, the Commission took a narrow view of its § 7 powers, and the field price of natural gas began to soar.[1] Matters came to a head in the so-called *CATCO* proceeding, in which the Commission certificated the sale of the largest quantity of natural gas theretofore dedicated to interstate commerce at a price above those then prevailing, on the ground that if it denied the certificate the refusal of producers to dedicate the gas might result in an eventual shortage in supply. This Court held in *Atlantic Rfg. Co.* v. *Public Serv. Comm'n* (*CATCO*), 360 U. S. 378, that the Commission should have done more.

The Court began in *CATCO* by stating that the Natural Gas Act "was so framed as to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges." 360 U. S., at 388. The Court then noted that the Act required that all rates charged be "just and reasonable." However, the Court stated that the determination of just and reasonable rates under §§ 4 and 5 was proving to be inordinately time-consuming, and that, because those rates became effective only prospectively, the consumer had no protection from excess charges collected during the pendency of those proceedings. The Court said:

> "[T]he inordinate delay presently existing in the processing of § 5 proceedings requires a most careful scrutiny and responsible reaction to initial price

[1] See generally Johnson, Producer Rate Regulation in Natural Gas Certification Proceedings: *CATCO* in Context, 62 Col. L. Rev. 773, 782–788 (1962).

> proposals of producers under § 7. . . . The fact that prices have leaped from one plateau to the higher levels of another . . . [makes] price a consideration of prime importance. This is the more important during this formative period when the ground rules of producer regulation are being evolved. . . . The Congress, in § 7 (e), has authorized the Commission to condition certificates in such manner as the public convenience and necessity may require. Where the proposed price is not in keeping with the public interest because it is out of line or because its approval might result in a triggering of general price rises or an increase in the applicant's existing rates by reason of 'favored nation' clauses or otherwise, the Commission in the exercise of its discretion might attach such conditions as it believes necessary." 360 U. S., at 391.

After the *CATCO* decision, the Commission, under the scrutiny of the courts, began to work out a system for determining the maximum initial prices at which gas should move, pursuant to contracts of sale, during the interval preceding establishment of just and reasonable rates. It based this "in-line" price upon current prices for gas in the area of the proposed sale, taking into account the possibility that the proposed rate might result in other price rises due to most-favored-nation clauses.[2] The

[2] See, *e. g., United Gas Improvement Co.* v. *FPC*, 283 F. 2d 817; *Public Serv. Comm'n* v. *FPC*, 109 U. S. App. D. C. 292, 287 F. 2d 146; *United Gas Improvement Co.* v. *FPC*, 287 F. 2d 159; *United Gas Improvement Co.* v. *FPC*, 290 F. 2d 133 and 147; *California Oil Co., W. Div.* v. *FPC*, 315 F. 2d 652.

A two-party most-favored-nation clause assures a producer that he will receive the highest price currently being paid by his purchaser to any producer in the same area. A three-party most-favored-nation clause guarantees a producer the highest price presently being paid to any producer in the area by any purchaser. See, *e. g., Pure Oil Co.*, 25 F. P. C. 383.

Commission and courts generally excluded from consideration or gave diminished weight to those current prices which were "suspect" because they were embodied in permanent certificates still subject to judicial review; because they were contained in temporary certificates issued on the *ex parte* representations of producers; or because they had been certificated in proceedings which occurred before this Court's *CATCO* decision or in proceedings from which representatives of East Coast consumers and distributors (commonly referred to as the "seaboard interests") had been erroneously excluded.[3] After some hesitation,[4] the Commission decided to bar producers from presenting cost evidence at in-line price proceedings, on the ground that its admission would make the hearings too long-drawn-out. After determining the in-line price, the Commission conditioned the permanent certificate to provide that the producer could not initially sell the gas at a greater price. The Commission also began to condition certificates so as to limit the level to which the price might be raised, pursuant to escalation clauses in the contract, during a given period or pending completion of the relevant area rate proceeding.[5]

This Court generally approved this method of regulation in *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U. S. 223. There the Court held that the Commission might properly refuse to hear cost evidence in in-line proceedings, and that the Commission might

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[3] See, *e. g.*, *United Gas Improvement Co.* v. *FPC*, 283 F. 2d 817; *United Gas Improvement Co.* v. *FPC*, 287 F. 2d 159; *Texaco Seaboard Inc.*, 29 F. P. C. 593; *Hassie Hunt Trust (Operator)*, 30 F. P. C. 1438, aff'd *sub nom. Continental Oil Co.* v. *FPC*, 378 F. 2d 510.

[4] See *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U. S. 223, 228, n. 3.

[5] See, *e. g.*, *Placid Oil Co.*, 30 F. P. C. 283. In 1961, the Commission by rule prospectively limited the forms of the escalation clauses themselves. See *infra*, n. 6.

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impose moratoria on price increases above specified levels. The Court also held in *Callery* that when issuance of permanent certificates is held on judicial review to have been erroneous, the Commission may on remand insert in the new certificates conditions requiring refund of amounts collected under the erroneously issued certificates in excess of the subsequently determined in-line price.

The cases now before us originated in producer applications for permanent certificates to sell gas produced in three Texas Railroad Commission districts on the Texas Gulf Coast, under contracts entered into between 1958 and 1963. The Commission's conditional certification of proposed sales in District 4, 31 F. P. C. 623, was appealed to the Court of Appeals for the Tenth Circuit. That Court upheld the Commission's price line against challenges by both producers and the seaboard interests, rejecting in particular the charge of the seaboard interests that the Commission erred in taking account of prices at which gas had been sold under temporary certificates. 370 F. 2d 181. In the same opinion, the Tenth Circuit stated that the Commission had no power to order refunds of amounts collected by producers in the past under temporary certificates which contained no refund conditions and had not been appealed, and it subsequently reiterated that view in reversing on appeal a Commission decision, 36 F. P. C. 309, ordering the District 4 producers to make such refunds. 376 F. 2d 578.

Orders of the Commission conditionally certificating the proposed sales in Districts 2 and 3, 34 F. P. C. 897 and 930, were appealed together to the Court of Appeals for the District of Columbia Circuit. In a single opinion, that court held that in the circumstances of the cases before it the Commission had erred in giving weight to sales under temporary certificates when it set the in-line prices. No issue as to refund power was raised in the

District of Columbia appeal, but the court did hold that the Commission committed further error in reserving to pipeline proceedings the question, raised by seaboard interests, of whether there was a public need for the gas which was to be sold. 126 U. S. App. D. C. 26, 373 F. 2d 816.

We granted certiorari and consolidated the cases for argument, 389 U. S. 811, to consider the following matters: (1) Did the Commission err in determining the in-line prices here in issue? (2) May the Commission order refunds of amounts collected under unconditioned temporary certificates in excess of the eventually determined in-line price? (3) Must the Commission, on request of interested parties, decide in the certification proceeding itself whether the gas to be sold is actually needed by the public, or may it properly deal with that issue only in pipeline proceedings? For reasons which follow, we affirm the decision of the Court of Appeals for the Tenth Circuit and reverse that of the Court of Appeals for the District of Columbia Circuit on the in-line price question. We reverse the decision of the Tenth Circuit on the refund issue and that of the District of Columbia Circuit on the matter of "need." We uphold the orders of the Commission in full.

I.

The first issue is whether the Commission acted correctly in setting the in-line prices here under review. In order adequately to resolve that question, it is necessary to have a more precise idea of the functions of in-line prices.

One function of an in-line price is that it serves as a "ceiling" on the rate at which gas may be sold under the certificate containing the price condition. However, its effect in preventing contractually authorized price rises is legally limited, for under § 4 of the Act a producer

is free, upon 30 days' notice to the Commission, to raise its price to the extent that its contract permits, subject to the Commission's power under § 4 (e) to suspend the effectiveness of the increase for a period of five months and to order refunds if the increased rate turns out to be higher than the just and reasonable rate thereafter found for the area.[6]

A second function of an in-line price is that it constitutes a "floor" below which the Commission may not order refunds under § 4 (e) of the Act. Section 4 (e) states that upon the filing of a § 4 rate increase, the Commission may on its own authority undertake a hearing to determine whether the rate is just and reasonable, simultaneously suspending the rate increase for up to five months. If the suspension period expires before the completion of the hearing, the Commission may

> "by order, require the natural-gas company to furnish a bond . . . to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase . . . , and, upon completion of the hearing and decision, to [*sic*] order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified."

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[6] In the cases before us, the Commission did utilize its auxiliary power, see *supra*, at 19–20, to limit the amount of such § 4 increases, but the producers remained free after six months (*i. e.*, 30 days' notice plus five months' suspension) to raise their prices at least 10%, if their contracts permitted. In 1961, after many of the contracts in these cases had been entered into, the Commission issued a rule which prospectively limited the types of escalation clauses which might be included in contracts. See Order No. 232, 25 F. P. C. 379. This order was modified by Order No. 242, 27 F. P. C. 339. See also 18 CFR § 154.93; *FPC* v. *Texaco Inc.*, 377 U. S. 33, 42–44.

The Commission's practice has been that when a producer files a rate increase on a contract in an area where an area rate proceeding is in progress, its application is consolidated into the area rate proceeding, thereby rendering it subject to the refund provision of § 4 (e).[7]

It has sometimes been contended that when a producer operating under a nonreviewable permanent certificate increases its price under § 4, the permanently certificated price is not a lower limit on the refund power, and that if the eventual just and reasonable area rate is below the permanently certificated price, the Commission may order a refund not merely of the price increase but of the entire difference between the increased rate and the just and reasonable rate.[8] The Commission has never passed on this contention,[9] and this Court has twice rejected it in dictum. In *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U. S. 137, 146, the Court interpreted § 4 (e) as meaning that "the Commission is empowered to require the company to collect the increment under bond and accounting, and refund it if it could not make out its case for the increase." In *Callery*, *supra*, the Court stated that "[t]he fixing of an initial 'in-line' price establishes a firm price at which a producer may operate, pending determination of a just and reasonable rate, without any contingent obligation to make refunds should a just and reasonable rate turn out to be lower than the 'in-line' price." 382 U. S., at 227.

We adhere to the dicta in *Callery* and *Sunray Mid-Continent*. That outcome comports better with the

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[7] See, *e. g.*, 30 F. P. C. 1354, 1357.

[8] See, *e. g.*, 2 Joint Initial Staff Brief, Hugoton-Anadarko-Texas Gulf Coast Area Rate Proceedings, F. P. C. Docket Nos. AR 64–1 and AR 64–2, at 486–488.

[9] The Commission specifically reserved decision of this question in its decision in the Permian Basin area rate proceeding. See 34 F. P. C. 1068, 1074–1075.

language of § 4 (e) than does the alternative. It is true that § 4 (e) in terms gives the Commission power to refund "the portion of such increased rates or charges" found to be excessive, and does not expressly limit the refund to the rate increase or increment. However, the accounting provision, which appears earlier in the same sentence, requires that the producer account only for the "amounts received by reason of such increase." If it had been intended that the refund obligation should extend to greater amounts, the accounting requirement logically should have extended to them also. Viewing the Act more broadly, there is another reason why this interpretation of § 4 (e) is preferable. It seems incontestable that if a producer consistently sells gas at the price specified in a final, permanent certificate, and does not attempt to increase its price, the Commission may not order it to make refunds simply because the just and reasonable rate for its area turns out to be below the in-line price. This would amount to a reparation order, and this Court has repeatedly held that the Commission has no reparation power.[10] It would be anomalous to treat an increased price as a trigger for a refund obligation which would leave the producer with a smaller net return than if it had never increased its price at all. We therefore consider and hold that an initial price which is authorized in a final, unconditioned permanent certificate is a lower limit below which a refund cannot be ordered under § 4 (e).

Since an initial price and a refund floor conceivably may serve significantly different ends,[11] we shall give

[10] See, *e. g.*, *FPC* v. *Hope Natural Gas Co.*, 320 U. S. 591, 618; *Montana-Dakota Utils. Co.* v. *Northwestern Public Serv. Co.*, 341 U. S. 246, 254.

[11] For example, in some situations a relatively high initial price might be thought desirable to encourage producers to develop new reserves but a lower refund floor might be deemed necessary to protect consumers.

separate consideration to these two functions of the in-line prices now under review. It is appropriate to begin with the initial price function, because in the proceedings before us the Commission apparently viewed the in-line prices it was setting almost entirely as initial prices and gave no explicit consideration to their effects as refund floors.[12]

A.

The thrust of this Court's *CATCO* opinion was that the Commission should use its § 7 conditioning power to prevent large jumps in initial contract prices, pending the determination of just and reasonable rates. At one time, the Commission apparently hoped that by receiving abridged cost evidence it could establish maximum initial prices which would be near approximations of the just and reasonable rates which would later be established. The Commission eventually concluded that this hope was ill-founded, and in *Callery* this Court approved the Commission's exclusion of cost data from certification hearings. See 382 U. S., at 228 and n. 3.

In view of the Commission's decision to rely solely upon contemporaneous contract prices in setting initial rates, there can be no assurance that an initial price arrived at by the Commission will bear any particular relationship to the just and reasonable rate. Any such assurance would necessarily be based on a belief that the current contract prices in an area approximate closely the "true" market price—the just and reasonable rate. Although there is doubtless some relationship, and some economists have argued that it is intimate,[13] such a belief would contradict the basic assumption that has caused natural gas production to be subjected to regulation and which must have underlain this Court's *CATCO* deci-

[12] See 31 F. P. C., at 629–637; 34 F. P. C., at 900–904, 933–938.

[13] See, *e. g.*, M. Adelman, The Supply and Price of Natural Gas 25 (1962).

sion—namely, that the purchasing pipeline, whose cost of purchase is a current operating expense which the pipeline is entitled to pass on to its customers as part of its rates, lacks sufficient incentive to bargain prices down.[14]

One way in which the Commission might have fulfilled the *CATCO* mandate to ensure that the lack of purchaser bargaining incentive did not result in too drastic an interim price rise would have been to freeze prices at their pre-*CATCO* levels. However, this would have resulted in locking into the price structure some of the abrupt leaps in price which had occurred prior to *CATCO*, as well as risking the eventual erosion of producer incentive through disregard of rising costs. Hence, it was reasonable for the Commission to set initial prices by reference to contemporary contract prices, which, though not an accurate reflection of the "true" market price, were the only indirect evidence available to the Commission of cost trends. And it was also within the Commission's discretion to exclude, where possible, those contract prices still subject to Commission and court review, because those prices might reflect price jumps impermissible under *CATCO*.

Thus, the initial price doctrine as it had developed by the time of *Callery*, see 382 U. S., at 226–228, was a rational and permissible way of implementing the *CATCO* requirement. Turning to the particular proceeding now under review, we hold that the methods there used by the Commission were also acceptable ways of determining initial prices.

On September 28, 1960, the Commission began its post-*CATCO* regulation of sales in the districts here

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[14] See, *e. g.*, *Permian Basin Area Rate Cases*, 390 U. S., at 792–795; E. Neuner, The Natural Gas Industry 148–177, 209–290 (1960).

involved by issuing its Statement of General Policy No. 61–1, 24 F. P. C. 818. The Policy Statement announced the ceiling price at which new sales would be certificated in each district. For each of Texas Railroad Commission Districts 2, 3, and 4, the Policy Statement ceiling was 18¢ per Mcf (thousand cubic feet) of gas. With respect to District 4, the Commission on August 30, 1962, determined an in-line price of 15¢ per Mcf for sales contracted prior to September 28, 1960, the date of the Policy Statement. 28 F. P. C. 401. That decision is not in issue here. On the same date, the Commission scheduled a proceeding, known as the *Amerada* proceeding, to determine the in-line price for sales contracted between September 28, 1960, and August 30, 1962. 28 F. P. C. 396.

On March 23, 1964, the Commission terminated the *Amerada* proceeding by issuing the first of the orders here under review. 31 F. P. C. 623. The Commission determined that the in-line price for the period under study should be 16¢ per Mcf. In reaching this conclusion, the Commission relied primarily on a comparison of prices in contracts entered into during the two-year life of the Policy Statement and the preceding two years, on the ground that the in-line price should mirror the price at which substantial quantities of gas were currently moving in interstate commerce.

This desire to reflect current conditions also caused the Commission to give some weight to prices under temporary certificates, because only 1.4% of the gas in the area was currently moving under permanent certificates. The Commission recognized that these temporary prices were "suspect," and that they largely consisted of the very prices whose "in-lineness" was then being determined. However, the Commission decided that the risk of considering such prices was overbalanced by the fact that not to take them into account would be to ignore the

prices at which the great bulk of gas was then moving in commerce. The Commission did take the unreliability of the temporary prices into consideration when it refused to accept the 17.2¢ average contract price for all sales as the in-line price, relying as well upon its belief that "the teachings of *CATCO* require that we draw the line at the lowest reasonable level." 31 F. P. C., at 637. The Commission also placed "some measure of weight" on its Policy Statement guideline price promulgated in 1960. The Commission further noted that 82% of the gas sold under post-Policy Statement contracts moved at 16¢ or more per Mcf, and stated that "[i]n the final analysis our action in fixing the price at which these sales should be certificated requires an exercise of our informed judgment and utilization of the expertise developed in the handling of thousands of producer certificate applications." 31 F. P. C., at 636–637.

On appeal, the Tenth Circuit approved the Commission's partial reliance upon temporary prices and upon its Policy Statement. 370 F. 2d 181. That decision is challenged by the seaboard interests, who claim that the Commission's reliance upon these "improper" factors caused it to set too high a price for the post-Policy Statement period.

We cannot conclude, given the extraordinary discretion which necessarily attends such a finding as the Commission was required to make, that the Commission took into account any impermissible factors or that the resulting initial price was too high as a matter of law. The seaboard interests apparently concede that contract prices are relevant in fixing initial prices, for they do not object to the Commission's consideration of permanently certificated prices. They complain only of the weight given the guideline and temporarily certificated prices. However, permanently certificated prices are germane only because they provide some indication of cost trends.

See *supra,* at 25–26. Guideline and temporary prices may serve the same function.

The Commission's District 4 guideline price, though its exact level was admittedly arbitrary, did place a "lid" on contract prices in the area for the period. The guideline price was therefore relevant to the determination of initial prices insofar as contract prices in the area would have been higher but for the guideline price, and to the extent that those higher prices would have represented cost trends and not merely the absence of a free market. The Commission evidently did not give the guideline price great weight, since it set the initial rate some 2¢ lower. We think that the weight given was justified.

Consideration of the temporary prices was also warranted because they pointed to cost trends, especially in light of the fact that 98.6% of the gas was then flowing under temporary certificates. Their use had an additional justification. In District 4, the seaboard interests evidently challenged almost all applications for permanent certificates at prices above 15¢ per Mcf, thereby greatly delaying the issuance of permanent certificates at higher levels.[15] Had the Commission refused to consider any but permanently certificated prices in setting the initial price, it would in effect have allowed the seaboard interests to determine that price. We consider that the Commission did not abuse its discretion in giving the temporary prices some weight.

Finally, we hold that the ceiling price of 16¢ was within the "zone of reasonableness" within which the courts may not set aside rates adopted by the Commission, see, *e. g., FPC* v. *Natural Gas Pipeline Co.,* 315 U. S. 575, 585–586, and that it fulfilled the *CATCO* mandate not to allow abrupt price rises. The 16¢ price was at the lower end of the spectrum of current prices

[15] See Brief for Sunray DX Oil Company et al. 11, 23–26.

considered by the Commission, and it embodied only a 1¢ price rise.

To determine the in-line prices in Texas Railroad Commission Districts 2 and 3, for which the Policy Statement had also set a ceiling price of 18¢ per Mcf for sales after September 28, 1960, the Commission set two separate proceedings. The District 2 or *Sinclair* proceeding, scheduled on March 25, 1964, involved the establishment of in-line prices for sales under contracts executed between May 12, 1958, and January 1, 1964.[16] The District 3 or *Hawkins* proceeding, initiated on March 30, 1964, involved sales under contracts executed between September 16, 1958, and October 1, 1963. See 31 F. P. C. 725. In both proceedings, the Commission began by dividing all of the sales in question into two groups, those contracted prior to the date of the Policy Statement and those contracted afterward. The two proceedings were terminated by two Commission orders of September 22, 1965, determining in-line prices for each area during each period. 34 F. P. C. 897, 930.

In the District 2 or *Sinclair* proceeding the Commission set an initial price of 15¢ per Mcf for the pre-Policy Statement period and 16¢ for the later period. The 15¢ price is not here in issue. The seaboard interests contend that the 16¢ price was too high. In fixing the 16¢ price, the Commission took into account five factors. First, it apparently gave full weight to the permanently certificated prices at which about 40% of the gas in the area was currently moving. Second, it gave some but "not undue" force to the temporary prices at which 60% of the gas currently flowed. Third, it assigned "some weight" to the original, unconditioned contract prices in the area, on the ground that those prices "do show economic trends in the area." 34 F. P. C., at

[16] See 4 Joint Appendix 128.

937. Fourth, the Commission took into consideration the 16¢ volumetric median price and the 15.29¢ volumetric weighted average price of all permanently and temporarily certificated sales in the area after the date of the Policy Statement. Fifth, it took into account the fact that 53% of the gas in the area was presently moving at prices at or below 16¢.

In the District 3 or *Hawkins* proceeding, the Commission fixed an initial price of 17¢ per Mcf for the post-Policy Statement period and reaffirmed an earlier-established 16¢ initial price for previous sales. The seaboard interests attack the 17¢ price as too high. Superior Oil Company asserts that both prices are too low. We confine ourselves at present to the contention of the seaboard interests. In arriving at the 17¢ price, the Commission considered five factors. First, it gave full weight to the permanently certificated sales of moderate volumes of gas at 15¢ and 16.2¢, a small volume at 16.5¢, and large volumes at 18¢. Second, it accorded "some weight" to temporary prices. Third, it noted that the 17¢ price "[reflects] the weighted average price of 16.17 cents" for permanently certificated sales. 34 F. P. C., at 903. Fourth, it gave "some weight" to original, unconditioned contract prices, for exactly the same reason as in *Sinclair*. See 34 F. P. C., at 902. Fifth, the Commission took into consideration the fact that 43% of all permanently certificated sales in the area were at prices at or above 17¢.

On appeal, the Court of Appeals for the District of Columbia Circuit sustained the challenge of the seaboard interests to both the *Sinclair* and *Hawkins* post-Policy Statement prices, holding that it was error for the Commission to give any consideration to temporary and unconditioned contract prices. 126 U. S. App. D. C. 26, 373 F. 2d 816. That decision is attacked by all of the producer parties.

The producers assert that the Court of Appeals erred in holding that the Commission should not have taken into account temporary and unconditioned contract prices when it fixed the post-Policy Statement prices for Districts 2 and 3. We sustain this contention. It is true that in Districts 2 and 3 a much larger percentage of the gas was currently moving under permanent certificates than in District 4. However, for reasons which appear in our discussion of the District 4 proceedings, see *supra*, at 28–29, the temporary and unconditioned contract prices were nonetheless germane as indicating cost trends.[17] The Commission acknowledged their relative unreliability by according them only a diminished force. In these circumstances, we cannot conclude that the Commission exceeded its authority by giving them any weight at all.

Nor do we find any error in the Commission's selection of the 16¢ and 17¢ initial prices from the information before it. Although these prices, and particularly the 17¢ price in *Hawkins*, ranged nearer the high end of the price spectrum than did the District 4 price, we cannot say that either was so high as to fall outside the "zone of reasonableness" within which the Commission has rate-setting discretion. See *supra*, at 29. And since the initial prices decided upon were only 1¢ above those previously prevailing, they did not breach the *CATCO* directive to avoid excessively large price increases.

The Superior Oil Company contends that the initial prices established in District 3 for both the pre- and post-Policy Statement periods were too low for a number of reasons, mainly because the Commission excluded

[17] The seaboard interests apparently followed the same course in Districts 2 and 3 as in District 4, challenging all applications for permanent certificates at prices above 15¢ per Mcf. See Brief for Shell Oil Company et al. 6–8, 19–21.

from consideration certain relatively high prices at which gas was presently being sold in the area. All of these challenges were rejected by the Court of Appeals for the District of Columbia Circuit.

The data considered by the Commission in setting the 17¢ District 3 post-Policy Statement price have already been described. See *supra*, at 31. In establishing the 16¢ pre-Policy Statement price, the Commission took into account four factors. First, it gave full force to permanently certificated sales of small volumes of gas at prices below 16¢ and of comparatively large volumes at 16¢ and 16.2¢. Second, it took into consideration the fact that 72% of all sales, comprising "a little more than half" the total volume of gas, occurred at prices of 16¢ or less. Third, the Commission gave "some weight" to permanently certificated sales of very large volumes of gas at 17.5¢ or above, even though it regarded those prices as suspect. Fourth, the Commission apparently took into account the weighted average price of 15.16¢ for all sales except the suspect sales at 17.5¢ and above.

Superior's most strongly pressed contention is that the Commission erred in allegedly failing to consider nine large-volume sales at 20¢ per Mcf when it set the 16¢ initial price for the pre-Policy Statement period. The Commission recognized in its opinion that the inclusion of these sales at full strength would have a "strong [upward] effect" upon the average of all prices for the period. However, it concluded that the impact of the price should be "discounted." The Commission noted that

> "six of the nine sales were involved in *Trunkline Gas Co., et al.*, 21 FPC 704 . . . , with respect to which [the New York Public Service Commission's] petition for review was dismissed because not timely." 34 F. P. C., at 902.

The Commission then quoted from an earlier decision, *Texaco Seaboard Inc.*, 29 F. P. C. 593, 597, in which it discounted the effect of the same sales on the ground that they "would have been set aside, for failure to permit a proper party to intervene, save for the procedural defect in the PSC review action in the *Trunkline* case." The Commission went on to point out that two of the three remaining 20¢ sales also had been certificated in proceedings from which the exclusion of the New York Commission had been upheld on the same procedural ground.[18]

We think that the Commission acted within its discretion in discounting the force of these 20¢ sales. Those sales were out of line with respect to the price structure which emerged after *CATCO*, and the Commission had reason to believe that they would have been set aside on judicial review had it not been for a procedural defect. We do not think that the Commission was compelled to give full weight to these prices.

Superior also contends that the initial prices established for the pre-Policy Statement period were too low because the Commission excluded from consideration a number of 1955–1956 sales at 17.5¢ to Coastal Transmission Company. In justification for giving discounted effect to these prices, the Commission again cited its *Texaco Seaboard* decision, 29 F. P. C. 593, in which it also discounted those sales. Among the justifications put forward in *Texaco Seaboard* was the fact that Coastal was at the time of the sales a new pipeline company, which neither had a certificate nor was yet in operation, so that the prices may have included a higher-than-normal allowance for risk. We think that this factor

[18] See 34 F. P. C., at 902, n. 3. It appears that the last of the sales was also in this category. See *ibid.*; 3 Joint Appendix 131, 136, n. d; *Austral Oil Co.*, 22 F. P. C. 658 and 858.

alone was sufficient to justify the Commission's exercise of discretion in discounting these sales.

Superior next asserts that with respect to both time periods the Commission erred in failing to take account of certain prices embodied in settlement orders. It is conceded by Superior that all of these settlements occurred at the then-prevailing guideline or in-line prices enforced by the Commission.[19] We hold that the Hearing Examiner and the Commission had discretion to disregard these sales, since they did not supply independent evidence of market trends.

Superior further complains of the Commission's alleged failure to take enough notice of temporary prices and its refusal to consider prices of intrastate sales. The Commission did give some consideration to temporary prices, see *supra*, at 31, 33, and for reasons which appear sufficiently from what has gone before, see *supra*, at 26, we hold that it did not err in refusing to give them more weight. We also hold that the Commission acted within its discretion when it rejected evidence of intrastate prices submitted by the producers on the ground that:

> "these prices do not cover the entire area nor is there anything to show that they are representative so as to make them comparable to the interstate arrays." 34 F. P. C., at 904.

Finally, Superior asserts that the Commission acted incorrectly in relying on estimated rather than actual volumes of gas sold during both periods. We find acceptable the Commission's justification, which was that actual volumes were not known for the years 1962 and 1963. Moreover, use of actual volumes would have made no significant difference, since Superior agrees[20]

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[19] See Brief for the Superior Oil Company 36, n. 48.

[20] See *id.*, at 39–40.

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that the only result would have been to give enhanced force to the 20¢ sales, which properly were given only slight weight.[21]

B.

We now turn to the question whether the price levels established by the Commission in these proceedings were proper when regarded as refund floors. This Court stated in *CATCO* that the Natural Gas Act "was so framed as to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges." 360 U. S., at 388. Since the Natural Gas Act nowhere refers to "in-line" prices, the "excessive rates" referred to must be rates in excess of the just and reasonable rate at which § 4 (a) commands that all gas must move. Logically, this would seem to imply that to assure the "complete, permanent and effective bond of protection" referred to, any rate permitted to be charged during the interim period before a just and reasonable rate can be determined must be accompanied by a condition rendering the producer liable for refunds down to the just and reasonable rate, should that rate prove lower than the initial rate specified in the certificate.

Despite this apparent logic, the Commission seems never to have imposed a refund condition of this type, though it has occasionally considered the function of an in-line price as a refund floor in determining the level of

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[21] Superior also claims that the Commission abused its discretion by considering sales at prices below 14¢ in fixing the initial rates for both periods, even though it had excluded such sales in previous District 3 in-line proceedings. Superior did not mention this point in its petition for rehearing before the Commission. See 3 Joint Appendix 314 (i); Exceptions of the Superior Oil Company to the Decision of the Hearing Examiner, *In the Matter of H. L. Hawkins & H. L. Hawkins, Jr. (Operator)*, F. P. C. Docket No. G–18077. Hence, the question is not properly before us. See Natural Gas Act § 19 (b), 15 U. S. C. § 717r (b).

the price.[22] The courts seem never to have suggested that the Commission impose such conditions. In *Callery, supra,* this Court without dissent approved the Commission's imposition of an initial price unaccompanied by any such refund condition. The *Callery* Court also held, over a single dissent, that in compelling producers to refund excess amounts charged under permanent certificates later invalidated on judicial review,

> "the Commission could properly measure the refund by the difference between the rates charged and the 'in-line' rates to which the original certificates should have been conditioned. The Court of Appeals would delay the payment of the refund until the 'just and reasonable' rate could be determined. We have said elsewhere that it is the duty of the Commission, 'where refunds are found due, to direct their payment at the earliest possible moment consistent with due process.' *Federal Power Comm'n* v. *Tennessee Gas Transmission Co.,* 371 U. S. 145, 155." 382 U. S., at 230.

In view of the fact that an initial price and a refund floor might be used to achieve distinct regulatory goals, see *supra,* n. 11, it seems regrettable that the Commission and courts apparently have never entertained the possibility of separating these two aspects of an "in-line price" in particular cases. However, we think that in light of *Callery* and the other precedents the Commission was not obliged in this instance to give explicit consideration to the establishment of a distinct refund floor. The same factors are present here as in *Callery.* The need to speed refunds to consumers and to assure producers of a firm price are identical. We cannot say, therefore, that the Commission breached any duty in failing expressly to consider whether the prices it fixed were suitable when regarded as refund floors.

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[22] See, *e. g., Texaco Seaboard Inc.,* 29 F. P. C. 593, 599.

Although we have approved the in-line prices in these cases when looked at as initial prices, we have yet to examine them in their role as refund floors. Viewing them in that way, we hold that they were not impermissibly high. In the District 4 or *Amerada* proceeding, the only disputed price is the 16¢ price for the post-Policy Statement period. The Commission fixed that price at a point near the lower end of the price range suggested by the price evidence before it, stating:

> "While there is evidence that points in the direction of a higher price we believe the teachings of *CATCO* require that we draw the line at the lowest reasonable level." 31 F. P. C., at 637.

We consider that the 16¢ price was not beyond the Commission's power, when regarded as a refund floor.

In the District 2 or *Sinclair* proceeding, the only price assailed as too high is the 16¢ price for the post-Policy Statement period. That price was nearer the high end of the spectrum of suggested prices than was the price established in District 4. The Commission did not enunciate the general principle which motivated it in selecting the 16¢ price level.[23] Although it would have been preferable for the Commission to have explained its reasoning, we believe that the price was permissible when regarded as a refund floor. The 16¢ price embodied an increase of only 1¢ per Mcf over the previously prevailing price. Such evidence as is now avail-

[23] The Hearing Examiner, who also arrived at a 16¢ price, apparently relied upon a general standard different from that used by the Commission in the District 4 or *Amerada* proceedings, *supra*. Quoting from the Commission's opinions in *Texaco-Seaboard Inc.*, 27 F. P. C. 482, 485, and *Hassie Hunt Trust (Operator)*, 30 F. P. C. 1438, 1445, the Examiner said:

"'. . . the price line does not accord with the highest price or prices permanently authorized but falls between the highest group of prices and the median price.'" 34 F. P. C., at 952.

able indicates that the 16¢ price probably will not exceed the just and reasonable price which will be established for the Texas Gulf Coast in a pending area rate proceeding.[24] In addition, we are not unmoved by the obvious desirability of bringing to a close this already prolonged proceeding, which belongs to an era of regulation apparently now ended.[25] We therefore hold that, despite the weaknesses in the Commission's opinion, the price established was within the Commission's authority when seen as a refund floor.

In the District 3 or *Hawkins* case, the only price challenged as excessive is the 17¢ price for the post-Policy Statement period. The District 3 proceeding was similar to that in District 2 (*Sinclair*). The price decided upon was again nearer the high end of the suggested range than that in District 4; again the Commission did not articulate the general principles which motivated it.[26] The District 3 price is even more vulnerable to attack than that in District 2, because it is 1¢ higher and therefore more likely to be above the just and reasonable

[24] The Commission staff has recommended a just and reasonable rate of 16.8¢ per Mcf for new gas-well gas sold in the Texas Gulf Coast under contracts dated after December 31, 1960, and delivered at a central point. See 2 Joint Initial Staff Brief, Hugoton-Anadarko-Texas Gulf Coast Area Rate Proceedings, F. P. C. Docket Nos. AR 64–1 and AR 64–2, at 375. The suggested just and reasonable rate for post-1960 new gas-well gas delivered at the wellhead is 16.4¢ per Mcf. *Ibid.* About 90% of Texas Gulf Coast gas is centrally delivered. See *id.*, at 390–391.

[25] During oral argument, counsel for the Commission stated that the Commission has suspended all contested in-line price proceedings pending completion of the area rate proceedings for the areas involved. The just and reasonable rates determined in those proceedings apparently will automatically become the in-line prices for those areas. Cf. *Permian Basin Area Rate Cases*, 390 U. S., at 822, n. 114.

[26] The Hearing Examiner was equally unspecific. See 34 F. P. C., at 914 *et seq.*

rate for the Texas Gulf Coast. Yet similar considerations lead us to approve it as being within the Commission's broad discretion. The 17¢ price represented only a 1¢ increase over the previous District 3 price. The fragmentary evidence now available about the forthcoming just and reasonable rate indicates that it will be only slightly, if at all, below 17¢.[27] It is again desirable that a prolonged and outmoded proceeding be brought finally to a close. Hence, we are constrained to hold that the 17¢ District 3 price was not excessive as a matter of law, when looked at as a refund floor.

II.

The next major issue is whether the Commission acted within its powers when it ordered the producers in the District 4 or *Amerada* proceeding to refund amounts previously collected under unconditioned temporary certificates, to the extent that the prices charged under those certificates exceeded the eventual in-line price.

A.

Section 7(c) of the Natural Gas Act, 15 U. S. C. § 717f (c), contains a proviso which permits the Commission to "issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate." Most of the producers involved in the *Amerada* proceeding applied for and were granted such temporary certificates, authorizing them to sell gas at or below the then-guideline price of 18¢ per Mcf. The "emergency" which most of these producers cited to justify the issuance of the certificates was an economic emergency which threatened them with loss of all or part of their gas supply unless deliveries

[27] See *supra*, n. 24.

could begin.[28] Eight of the certificates contained a condition specifying that should the eventual in-line price be lower than that charged under the certificate, a refund of the difference might be ordered. The other certificates did not include an express refund condition, although they did contain general cautionary language respecting further Commission action.[29]

The history of the refund orders now under review is as follows. When seaboard interests proposed the retroactive imposition of refunds in virtually identical circumstances in the 1962 *Skelly Oil Company* proceeding, the Commission decided not to order refunds because "the producers here have been operating . . . pursuant to effective temporary certificates containing no price condition, the validity of which [has] never been challenged on appeal." 28 F. P. C. 401, 413. In denying rehearing in *Skelly*, the Commission amplified its reasons, stating that because there was in the temporary certificates no explicit language to warn the producers of the possibility of a refund, "to proceed now and order the producers to make refunds would not be equitable regardless of any ultimate right we may have to order such refunds." 28 F. P. C. 1065, 1069. While *Skelly* was pending on appeal in the District of Columbia Circuit, the seaboard interests moved the Commission to insert prospective refund conditions in the temporary certificates of producers in the *Amerada* proceeding now before us. In denying that request, the Commission stated that, because the pro-

[28] See Brief for the Federal Power Commission 49, n. 37.

[29] The certificates contained provisions to the effect that:

"This acceptance for filing shall not be construed as constituting approval of any rate . . . ; nor shall such acceptance be deemed as recognition of any claimed contractual right or obligation . . . ; and such acceptance is without prejudice to any findings or orders which may be made in the final disposition of this proceeding . . . ." See, *e. g.*, 1 Joint Appendix 71–72.

ducers had relied on the absence of refund conditions when they dedicated their gas to interstate commerce, to impose prospective refund conditions would "so denature the value of a Commission authorization as to place any reliance upon our actions in this area in serious jeopardy." 29 F. P. C., at 225.

The Court of Appeals for the District of Columbia Circuit held on appeal in *Skelly*, 117 U. S. App. D. C. 287, 329 F. 2d 242, not only that the Commission had power to order retroactive refunds but that in the *Skelly* proceeding itself it should subject the question to "a broader and more penetrating analysis." 117 U. S. App. D. C., at 295, 329 F. 2d, at 250. In its subsequent in-line price decision in *Amerada*, the Commission noted that in *Skelly* the Court of Appeals had made it clear that the refund power did not depend upon the presence of express refund conditions but upon equitable considerations. Since the hearings before the Commission in *Amerada* had taken place prior to the decision on appeal in *Skelly*, the Commission deferred decision of the refund question in *Amerada*, so that the parties might submit further briefs. See 31 F. P. C., at 638–639. After full briefing of the refund issue, the Commission ordered the *Amerada* producers to refund all sums collected under the temporary certificates in excess of the in-line rate, with the exception of amounts expended for royalties and production taxes prior to the date of the decision on appeal in *Skelly* and in reasonable reliance upon the Commission's orders. 36 F. P. C. 309.

On appeal of the Commission's *Amerada* order setting the in-line price and deferring the refund question, the Court of Appeals for the Tenth Circuit noted the issuance of the subsequent Commission order compelling refunds and held that the refund issue was ripe for judicial review. Relying in part upon its earlier decision in *Sunray Mid-Continent Oil Co.* v. *FPC*, 270 F. 2d 404,

the Tenth Circuit held that the Commission lacked power to order refunds of amounts collected under unconditioned temporary certificates. 370 F. 2d 181. It reasoned that to permit such refunds would undermine producer confidence and destroy stability. When the Commission's refund orders were themselves appealed, the Tenth Circuit reaffirmed its position in a *per curiam* opinion. 376 F. 2d 578.

B.

We consider that in so holding the Tenth Circuit erred. The producers' initial contention in support of the opinion below is that temporary certificates are appealable orders, and that under § 19(b) of the Natural Gas Act, 15 U. S. C. § 717r(b), review must be sought within 60 days of the issuance of the certificate and not, as here, at the time of application for a permanent certificate. We find this argument unpersuasive. Temporary certificates normally are issued *ex parte,* upon receipt of an application from a producer in the form of a letter.[30] This procedure is authorized by a proviso to § 7 (c) of the Act, quoted *supra,* at 40, which permits the Commission to issue temporary certificates without any notice to potentially interested persons.[31] Hence, no one but the producer recipient may be aware of the issuance of a temporary certificate within the appeal period.

Moreover, to hold that a temporary certificate must be challenged immediately or not at all, as the producers suggest, might encourage appeals which would impair the usefulness of temporary certificates. Temporary certificates are intended to permit immediate delivery of gas in emergencies. To delay the issuance of the certificate

[30] See, *e. g.,* 1 Joint Appendix 78–81; 18 CFR § 157.17.

[31] Counsel for the Commission stated on oral argument that in the early 1960's the Commission, on its own initiative, did begin to make information about issuance of temporary certificates available to the public at its office.

and the flow of the gas until the completion of judicial review which might consume months or years would severely hamper the performance of this function. We therefore hold that parties, at least those other than the producer itself,[32] may challenge a temporary certificate at the time a permanent certificate is applied for.

The producers' second argument is that a temporary certificate is a "final" order creating vested rights, and that it may be altered only prospectively. This contention is related to the last, and has much the same flaw. To encourage early attack on temporary certificates would diminish their utility. Yet to discourage prompt challenges and simultaneously to hold that refunds could not be ordered for the interim period would in large part frustrate the objectives of the Natural Gas Act by allowing producers to operate for long intervals[33] on the basis of their own representations and with only minimal regulation by the Commission.

The producers' third contention, which coincides with the rationale of the Tenth Circuit below and in its previous decision in *Sunray Mid-Continent, supra,* is that temporary certificates must be retroactively unmodifiable in order that producers may be assured of a firm price at which to operate. We cannot accept this reasoning. When a producer has requested permission to begin delivery of gas prior to completion of normal certification procedures, due to an emergency, we think it not unfair that in return for that permission it accept the risk that at the termination of those procedures the terms pro-

[32] The Court of Appeals for the Fifth Circuit has held that the producer itself must challenge the certificate within 60 days after it is issued. *Texaco, Inc.* v. *FPC,* 290 F. 2d 149. There is no occasion for us to pass on the correctness of that decision.

[33] Some of the producers involved in the *Amerada* proceeding delivered gas under temporary certificates for more than 2½ years. *E. g.,* compare 1 Joint Appendix 71 with *id.,* at 166.

posed by it may be retrospectively altered to conform to the public interest.

We are strengthened in that view by this Court's decision in *Callery, supra.* The Court there held that when a permanent certificate, containing no refund condition, is held on judicial review to have embodied too high an in-line price, the Commission may on remand condition the new permanent certificate to require refund of the excessive charges received under the old. If the producer expectations created by a permanent certificate may thus be overridden by the public interest, then the surely lesser reliance induced by an "unconditioned" temporary certificate issued on the producer's own representations should not bar a later refund requirement. For all of these reasons, we hold that in the exercise of its power to condition permanent certificates under § 7 (e), the Commission may require producers to refund amounts collected under outstanding, unconditioned temporary certificates in excess of the finally established in-line price.[34]

C.

It remains to be considered whether the Commission was precluded from exercising its refund power in the particular circumstances of the *Amerada* proceeding.[35] The background and nature of the *Amerada* refund

[34] No party has contended that the refunds should have been based on the eventual just and reasonable rate, and we think it clear that the Commission did not exceed its authority in founding them on the in-line price. See *supra,* at 36–37; *United Gas Improvement Co.* v. *Callery Properties, Inc.,* 382 U. S. 223, 230.

[35] Because the Court of Appeals held that the Commission lacked power to require refunds, it did not pass on the producers' contentions that the refunds actually ordered were inequitable. Those contentions were presented to this Court in the producers' reply brief. Although we normally do not review orders of administrative agencies in the first instance, see, *e. g., FPC* v. *United Gas Pipe Line Co.,* 386 U. S. 237, 247, we consider it appropriate in this instance

orders have already been described. We conclude that neither the procedure followed nor the result reached by the Commission in imposing the *Amerada* refunds amounted to an abuse of discretion.

The producers assert that they were entitled to an irrevocable assurance of price in order that they might rationally decide whether to dedicate their gas to interstate commerce, and so that they might plan their budgets during the lives of the temporary certificates. However, we believe that such generally worded arguments are foreclosed by our decision upholding the Commission's refund power, for in the course of that decision we rejected the producers' claim that they were legally entitled to an assurance of a firm price at which to operate. See *supra*, at 44–45.

The producers further contend that the Commission's repeated indications that it would not order refunds, see *supra*, at 41–42, made the ordering of refunds inequitable in this instance, in that the Commission's pronouncements caused the producers to place unusual reliance upon the prices authorized by the temporary certificates. However, this kind of reliance is precisely what the Commission gave the producers an opportunity to prove on re-briefing. We cannot say that the Commission exceeded its discretion in finding that the producers did not show such reliance as to deprive the Commission entirely of refund power in this case. We note further that the Commission did give consideration to individual pleas for relief from the refund obligation, due to alleged hardship,[36] and that in other proceedings the Commission has

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to resolve this question without remand to the court below for initial consideration, in order that this extended proceeding may at last come to an end. Compare, *e. g.*, *Permian Basin Area Rate Cases*, 390 U. S., at 822, n. 114; *Chicago & N. W. R. Co.* v. *Atchison, T. & S. F. R. Co.*, 387 U. S. 326, 355–356.

[36] See 36 F. P. C. 962 (memorandum opinion and order confirming *Amerada* order requiring refunds).

granted such relief.[37] Therefore, although it is regrettable that the road which led to these refund requirements could not have been straighter,[38] we hold that the Commission did not exceed its authority.

III.

The third and last major issue is whether the Commission erred in failing to make a reasoned finding that there was a public need for the gas certificated in the District 2 and District 3 (*Sinclair* and *Hawkins*) proceedings. In those proceedings, the New York Public Service Commission asserted that there was no public need for the gas, alleging in particular that several of the purchasing pipelines were already obligated under "take-or-pay" provisions of existing contracts either to take more gas than they could foreseeably use or to pay for it.[39]

In both proceedings, the Commission refused to give more than perfunctory consideration to the issue of "need." Its stated justification was that the need question should be dealt with in pipeline rather than producer proceedings. The Court of Appeals for the District of Columbia Circuit held that the Commission erred in declining to come to grips with the need issue in the course of producer certification. 126 U. S. App. D. C. 26, 373 F. 2d 816. That court held that the Commission should have directed itself not only to the take-or-pay positions of the purchasing pipelines but to the question whether those

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[37] See *Turnbull & Zoch Drilling Co.*, 36 F. P. C. 164, 166–167.

[38] Cf. 1 Joint Appendix 159–162 (unreported opinions of Commissioners Morgan and Ross concurring in the Commission's Feb. 5, 1963, denial of prospective refund conditions in *Amerada*).

[39] A contractual "take-or-pay" provision obligates a pipeline, over a stated period, to take an average amount of gas or to pay for it. A "make-up" period is also specified, during which the pipeline may take the gas previously paid for without further payments. The "prepayments" for gas not yet taken usually are capitalized and included in the pipeline's rate base.

pipelines proposed to sell the gas to customers who would use it in an "economically 'inferior' way."

The Commission regulates pipelines in a number of different ways. When a pipeline must expand its facilities significantly in order to take on new supplies of gas, it is required by § 7(c) of the Natural Gas Act, 15 U. S. C. § 717f(c), to obtain a certificate of public convenience and necessity, which may be issued only after notice and hearing. In these certification proceedings, the Commission considers many matters, including the needs of the pipeline's customers and its gas supply.[40] The Commission also grants pipelines so-called "budget" authority to spend limited amounts on gas-purchasing facilities on an annual basis, without further Commission approval.[41] This authority is granted only after notice and opportunity for objection.[42] In addition, the Commission requires periodic reports from all pipelines,[43] and collects and publishes material on the supply of gas, including data on the pipelines' take-or-pay positions.[44]

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[40] See, *e. g.*, *Transwestern Pipeline Co.*, 36 F. P. C. 176, 191–199; *Transcontinental Gas Pipe Line Corp.*, F. P. C. Docket No. CP 65–181 (Phase II), Opinion No. 532, Nov. 6, 1967. See also *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U. S. 1.

[41] At present, "budget" authority permits a pipeline to expend on gas-purchasing facilities the lesser of $5,000,000 or 1.5% of its existing plant investment, with the total cost of any single gas-purchase project not to exceed the lesser of $500,000 or 25% of the total budget amount. See 18 CFR § 157.7 (b).

[42] See *id.*, § 157.9 *et seq.* Annual reports must be made to the Commission describing the prior year's construction. *Id.*, § 157.7 (b)(3).

[43] See *id.*, § 260.7.

[44] See Federal Power Commission, Annual Reports, 1963–1967; Federal Power Commission, The Gas Supplies of Interstate Natural Gas Pipeline Companies, Calendar Years 1963 and 1964 (February 1966); Federal Power Commission, The Gas Supplies of Interstate Natural Gas Pipeline Companies, Calendar Years 1964 and 1965 (August 1967).

We think that the Commission did not abuse its discretion in deciding that the need issue, in both its take-or-pay and end-use [45] aspects, can be better dealt with in such pipeline proceedings than in producer proceedings. In the first place, the requisite information is more readily available in pipeline proceedings. To resolve the take-or-pay issue, it is necessary to have information about the total gas supply of the purchasing pipeline, its outstanding sales contracts, and its take-or-pay situation under those contracts. These data normally will be in the possession of the pipeline, but not of the producer. Decision of the end-use question must be based on information not only about the customers of the purchasing pipeline but about the alternative uses to which the gas might be put by other pipelines which might buy it. This information will be known collectively by a number of pipelines; an individual producer cannot even know what customer of the purchasing pipeline will receive the gas it supplies.[46] Although it might be possible for the Commission to require the relevant pipeline or pipelines to furnish all this information in each producer certification proceeding,[47] that procedure would be cumbersome and would

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[45] The producers assert that the end-use aspect of the need issue is not properly before us because the New York Public Service Commission failed to raise the issue in its petition for rehearing before the Commission, as required by § 19 (b) of the Natural Gas Act, 15 U. S. C. § 717r (b). Since the Court of Appeals did rule on the end-use question, and since we hold in favor of the producers on all parts of the need issue, we think it appropriate to reach the question without passing upon the producers' procedural claim.

[46] See *California* v. *Lo-Vaca Gathering Co.*, 379 U. S. 366, 369–370; *Mississippi River Fuel Corp.* v. *FPC*, 102 U. S. App. D. C. 238, 252 F. 2d 619, 623–625.

[47] The Commission elsewhere has conceded that the administrative burden of such a procedure would not be unbearable. See Memorandum for the Federal Power Commission in *Austral Oil Co.* v. *FPC*, No. 504, October Term, 1967, at 5–6.

lengthen the producer proceedings, which we have previously commended the Commission for endeavoring to shorten.[48]

In the second place, there is reason to believe that the pipeline proceedings, supplemented by other forms of regulation available to the Commission, will provide an adequate forum in which to confront both aspects of the need issue. Turning first to the take-or-pay question, we note that the Commission has evinced a continuing concern about it. The current adverse take-or-pay positions of some pipelines, stressed by the seaboard interests in these proceedings, apparently were due in some part to a pre-1964 Commission requirement that each pipeline maintain a twelve-year supply of gas, in order to assure adequate reserves. In 1964 this requirement was made more flexible.[49] The Commission in 1965 ordered pipelines to submit more detailed reports on their contractual take-or-pay provisions.[50] And in 1967, at the termination of a rule-making proceeding begun in 1961, the Commission prescribed by rule that contractual take-or-pay provisions must allow the purchasing pipeline at least five years in which to take gas previously paid for without making additional payments.[51]

Thus, the Commission itself has taken steps to alleviate take-or-pay problems. Persons who want the Commission to take additional action have adequate opportunity to present their views during the Commission's rule-making [52] or pipeline proceedings. If a pipeline must build substantial new facilities to handle the gas in ques-

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[48] See *FPC* v. *Hunt*, 376 U. S. 515, 527; *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U. S. 223, 228, n. 3.

[49] See Order No. 279, 31 F. P. C. 750.

[50] See Order No. 301, 34 F. P. C. 76.

[51] See Order No. 334, 37 F. P. C. 110.

[52] See 18 CFR § 1.3 (notice requirement for substantive rule-making proceedings).

tion, then interested persons may express their objections in the certification proceeding.[53] Those who believe that a pipeline which seeks "budget" authority is in such a take-or-pay position that it should not be allowed to acquire new gas may ask that the authority be denied or conditioned. Although some gas may be taken by pipelines through existing facilities, without even "budget" authority,[54] these opportunities for a hearing seem sufficient to protect the public interest.

The Commission has undertaken to assure that gas is not devoted to wasteful end uses, and this Court has upheld its exercise of such authority. See *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U. S. 1. The Commission has dealt with this question primarily in pipeline certification proceedings.[55] This does not seem inappropriate, since any new use of significant amounts of gas will normally entail the erection of substantial new pipeline facilities, requiring certification. Persons who anticipate that a pipeline which is seeking "budget" authority will devote the gas to inferior end uses may request that the authority be withheld or limited. We believe that these opportunities for objection are adequate to protect the public interest in conservation of gas.

Of course, our approval of the Commission's decision to deal with the need question in pipeline proceedings does not imply that the Commission may neglect its statutory

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[53] The seaboard interests apparently achieved considerable success in a pipeline certification proceeding which grew out of the *Sinclair* proceeding now under review. See *Lone Star Gas Co.*, 36 F. P. C. 497; *Lone Star Gas Co.*, F. P. C. Docket No. CP 65–118, Order Vacating Certificates, Sept. 15, 1967.

[54] Counsel for the Commission estimated on oral argument that 25% of the gas involved in the *Sinclair* and *Hawkins* proceedings could be attached at existing facilities.

[55] See *supra*, at 48 and n. 40.

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duty to assure that sales of gas are required by the public "necessity." [58] This statutory obligation implies that when interested parties assert that the Commission has permitted or is about to permit the sale of significant quantities of unneeded gas, then the Commission must supply an adequate forum in which to hear their contentions. We hold only that, so far as appears from the record before us, pipeline proceedings can serve as such a forum. If subsequent events should demonstrate that existing pipeline proceedings are inadequate, then the Commission must provide new arenas for objection.

For the foregoing reasons, we affirm the decision of the Court of Appeals for the Tenth Circuit and reverse that of the Court of Appeals for the District of Columbia Circuit on the in-line price issue. We reverse the decision of the Tenth Circuit on the question of refunds and that of the District of Columbia Circuit on the matter of need.

It is so ordered.

MR. JUSTICE MARSHALL took no part in the consideration or decision of these cases.

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[58] The Commission has attempted to fulfill this duty by regulating both the take-or-pay and end-use aspects of the need question. See *supra*, at 48, 50, 51.

INTERSTATE CIRCUIT, INC., ET AL. *v.* CITY OF DALLAS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 42. Decided May 6, 1968.*

Certiorari granted; 366 F. 2d 590, vacated and remanded.

Grover Hartt, Jr., and *Edwin Tobolowsky* for petitioners in No. 42.

N. Alex Bickley and *Ted P. MacMaster* for petitioner in No. 44 and for respondent in No. 42.

PER CURIAM.

The petitions for writs of certiorari are granted. The judgment is vacated and the cases are remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of the opinion of this Court in *Interstate Circuit, Inc.* v. *City of Dallas*, 390 U. S. 676, decided April 22, 1968.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS would grant certiorari and reverse the judgment of the Court of Appeals for the reasons stated in the dissenting opinion of MR. JUSTICE DOUGLAS in *Ginsberg* v. *New York*, 390 U. S. 629, 650, decided April 22, 1968.

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*Together with No. 44, *City of Dallas* v. *Interstate Circuit, Inc., et al.*, also on petition for writ of certiorari to the same court.

PEYTON, PENITENTIARY SUPERINTENDENT *v.* ROWE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 802. Argued March 27, 1968.—Decided May 20, 1968.

Respondents, who are incarcerated under consecutive state prison sentences, have attacked as unconstitutional sentences which they have not begun to serve, in petitions for writs of habeas corpus which they have respectively filed in District Courts under 28 U. S. C. § 2241 (c)(3). That provision specifies that federal district courts may issue habeas corpus writs on behalf of prisoners who are "in custody in violation of the Constitution . . . of the United States." The District Courts, relying on *McNally* v. *Hill*, 293 U. S. 131 (1934), denied relief, holding that the petitions were premature since respondents were not "in custody" within the statute's meaning under the sentences which they were challenging and that respondents would not be able to attack those sentences until they started to serve them, which would not be until after 1990. The Court of Appeals reversed, reasoning that in light of more recent decisions this Court would no longer follow *McNally*. *Held:* A prisoner serving consecutive sentences is "in custody" under any one of them for purposes of § 2241 (c)(3) and may in a federal habeas corpus proceeding thereunder challenge the constitutionality of a sentence scheduled for future service. The decision in *McNally* v. *Hill*, *supra*, which was compelled neither by statute nor history and which constitutes an indefensible barrier to prompt adjudication of constitutional claims in the federal courts, is overruled. Pp. 58–67.

383 F. 2d 709, affirmed.

Reno S. Harp III, Assistant Attorney General of Virginia, argued the cause for petitioner. With him on the briefs was *Robert Y. Button*, Attorney General.

John J. Kirby, Jr., argued the cause for respondents, *pro hac vice*. With him on the brief was *Thomas S. Currier*.

Thomas C. Lynch, Attorney General, and *Edward P. O'Brien*, *Derald E. Granberg*, and *Clifford K. Thompson, Jr.*, Deputy Attorneys General, filed a brief for the State of California, as *amicus curiae*, urging reversal.

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

This case concerns the scope of 28 U. S. C. § 2241 (c)(3), which specifies that the United States District Courts may issue writs of habeas corpus on behalf of prisoners who are "in custody in violation of the Constitution . . . of the United States." The question presented is whether a district court may entertain a petition for a writ of habeas corpus from a prisoner incarcerated under consecutive sentences who claims that a sentence that he is scheduled to serve in the future is invalid because of a deprivation of rights guaranteed by the Constitution. The Court considered this issue in *McNally* v. *Hill*, 293 U. S. 131 (1934), and held that the habeas corpus statute does not authorize attacks upon future consecutive sentences. We granted certiorari in this case to re-examine *McNally*. 389 U. S. 1035 (1968). We conclude that the decision in that case was compelled neither by statute nor by history and that today it represents an indefensible barrier to prompt adjudication of constitutional claims in the federal courts.

Respondents, Robert Rowe and Clyde Thacker, are serving prison terms in the Virginia State Penitentiary. In June 1963 Rowe was sentenced to 30 years' imprisonment after a jury found him guilty of rape. Subsequently, he pleaded guilty to an indictment charging him with felonious abduction with intent to defile arising from the same events which had led to the rape conviction.[1] He

[1] Rowe's initial plea of double jeopardy had been overruled by the trial court.

was sentenced to a 20-year term on this conviction to run consecutively to the 30-year sentence. After exhausting state remedies,[2] Rowe petitioned for a writ of habeas corpus in the United States District Court for the Western District of Virginia. He did not attack the rape conviction, but alleged that the conviction for felonious abduction was constitutionally defective because he had been subjected to double jeopardy, because his plea of guilty had been involuntary, because the indictment had failed to state an offense and because he had been inadequately represented by trial counsel. Without reaching the merits of Rowe's claims, the District Court denied relief. Applying *McNally*, the court found Rowe was then detained under the 30-year sentence for rape. Since he did not claim that sentence was invalid, it was held that he was not then "in custody" under an unconstitutionally imposed sentence within the meaning of § 2241. The court concluded that it could not entertain Rowe's challenge to the conviction for felonious abduction until he was confined under the sentence imposed for that conviction. That time would not arrive until 1993.[3]

Thacker's § 2241 petition in the Eastern District of Virginia met a similar fate. He is imprisoned under a number of sentences totaling more than 60 years. He asserted that three consecutive five-year sentences imposed for housebreaking in 1953 were invalid because of

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[2] Rowe had filed an application for state habeas corpus relief in the Virginia Supreme Court of Appeals. This petition was denied under Virginia's version of the *McNally* rule. See *Peyton* v. *Williams*, 206 Va. 595, 145 S. E. 2d 147 (1965). Subsequent to the decision below, the Virginia Legislature enacted a statute, effective June 28, 1968, which will abolish the rule of prematurity in the State. See n. 17, *infra*.

[3] If Rowe receives full credit for "good time," the 30-year sentence will expire in 1982. Under the two sentences, he will be eligible for parole in 1974. If he were relieved of the 20-year term, he would be eligible for parole in 1970. See Va. Code Ann. § 53–251 (1967).

inadequate representation by counsel at the time he entered pleas of guilty.[4] Finding that Thacker's attack on these sentences was premature because he had not begun to serve them, the District Court dismissed the petition "without prejudice to Thacker's reapplication at the proper time." Under *McNally*, the "proper time" will be in 1994 when Thacker commences service of the first of the three sentences he challenges.[5]

The Court of Appeals for the Fourth Circuit consolidated the two cases. After a hearing *en banc*, it reversed and remanded them to the District Courts. 383 F. 2d 709 (1967). Recognizing that the District Courts had correctly applied *McNally*, the Court of Appeals declined to adhere to that decision. Writing for a unanimous court, Chief Judge Haynsworth reasoned that this Court would no longer follow *McNally*, which in his view represented a "doctrinaire approach" based on an "old jurisdictional concept" which had been "thoroughly rejected by the Supreme Court in recent cases." [6] *Id.*,

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[4] These sentences were originally suspended, but the suspension was revoked in 1956.

[5] If Thacker does not receive good-time credit, he will commence service of the three sentences in 2009. He will be eligible for parole in 1976.

[6] The decision of the Court of Appeals in the present case was preceded by two cases in which it held that § 2241 (c)(3) permits attack upon a future consecutive sentence which affects or may affect a prisoner's current parole eligibility. *Williams* v. *Peyton*, 372 F. 2d 216 (C. A. 4th Cir. 1967); *Martin* v. *Virginia*, 349 F. 2d 781 (C. A. 4th Cir. 1965). In *McNally*, the Court rejected the prisoner's argument that he was entitled to habeas corpus relief because he would be eligible for parole if the challenged sentence were invalidated. 293 U. S., at 134, 140. In *Williams* and *Martin*, the Court of Appeals concluded that this Court's decision in *Jones* v. *Cunningham*, 371 U. S. 236 (1963), represented a departure from this narrow reading of the habeas corpus statute.

at 714. We are in complete agreement with this conclusion and the considerations underlying it.

The writ of habeas corpus is a procedural device for subjecting executive,[7] judicial,[8] or private[9] restraints on liberty to judicial scrutiny. Where it is available, it assures among other things that a prisoner may require his jailer to justify the detention under the law.[10] In England where it originated and in the United States, this high purpose has made the writ both the symbol and guardian of individual liberty. 3 Blackstone, Commentaries *131–138; see *Ex parte Bollman*, 4 Cranch 75 (1807); *Ex parte Lange*, 18 Wall. 163 (1874); *Moore* v. *Dempsey*, 261 U. S. 86 (1923); *Johnson* v. *Zerbst*, 304 U. S. 458 (1938); *Brown* v. *Allen*, 344 U. S. 443 (1953); *Fay* v. *Noia*, 372 U. S. 391 (1963).

The habeas corpus jurisdiction of the federal courts is enumerated in 28 U. S. C. § 2241. Like the predecessor statute which controlled in *McNally*,[11] § 2241 provides for

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[7] *E. g., Darnel's Case* ["Five Knights' Case"] 3 How. St. Tr. 1–59 (K. B. 1627); *Ex parte Milligan*, 4 Wall. 2 (1866). The proceedings in *Darnel's Case* are summarized in D. Meador, Habeas Corpus and Magna Carta 13–16 (1966).

[8] *E. g., Bushel's Case*, Jones, T. 13, 84 Eng. Rep. 1123 (K. B.); *Walker* v. *Wainwright*, 390 U. S. 335 (1968).

[9] *E. g., Rex* v. *Clarkson*, 1 Strange 444, 93 Eng. Rep. 625 (K. B. 1721); see *Ford* v. *Ford*, 371 U. S. 187 (1962).

[10] The indignation aroused by the decision in *Darnel's Case*, *supra*, n. 7, led to enactment in 1627 of the Petition of Right, 3 Car. 1, c. 1, which condemned a return reciting that imprisonment was by "speciale mandatum Domini Regis" as insufficient under "the law of the land." See W. Church, A Treatise on the Writ of Habeas Corpus 8–9 (2d ed. 1893). In the United States, the Act of February 5, 1867, c. 28, 14 Stat. 385, made the writ available to "any person . . . restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States."

[11] Rev. Stat. § 753 (1874). For a collection and discussion of the federal habeas corpus statutes from the original Judiciary Act of 1789 to 1953, see G. Longsdorf, The Federal Habeas Corpus Acts Original and Amended, 13 F. R. D. 407 (1953).

the issuance of writs on behalf of persons "in custody." But the statute does not attempt to define the terms "habeas corpus" or "custody." Confronted with this fact, the Court in *McNally* reasoned that "[t]o ascertain its meaning and the appropriate use of the writ in the federal courts, recourse must be had to the common law . . . and to the decisions of this Court interpreting and applying the common law principles . . . ." *McNally* v. *Hill*, 293 U. S., at 136. We need not look very far to discover three principal characteristics of the writ as it had developed in the federal courts even before the decision in *McNally*. First, though the writ in England had been utilized largely to secure the admission to bail and discharge of prisoners,[12] its major office in the federal courts since the Civil War has been to provide post-conviction relief.[13] Second, the partial codifications of the common-law writ in England and more recent legislation in this country have contained specific and detailed provisions requiring *prompt* adjudication of the validity of the challenged restraint. See and compare Habeas Corpus Act of 1679, 31 Car. 2, c. 2; Act of February 5, 1867, c. 28, 14 Stat. 385; and 28 U. S. C. § 2243. Third, at least tentatively in *Frank* v. *Mangum*, 237 U. S. 309

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[12] The celebrated Habeas Corpus Act of 1679, 31 Car. 2, c. 2, was concerned exclusively with providing an efficacious remedy for pretrial imprisonment. See W. Church, A Treatise on the Writ of Habeas Corpus 21–32, 48–58 (2d ed. 1893).

[13] This development is explained in part by this Court's recognition that certain trial or sentencing defects could invalidate the proceedings in a court which had jurisdiction over the crime and the defendant, *e. g.*, *Ex parte Lange*, 18 Wall. 163 (1874), by the Court's decisions holding that some of the safeguards of criminal procedure embodied in the Bill of Rights are applicable to state criminal proceedings by virtue of the Due Process Clause of the Fourteenth Amendment, and by the requirement that a state prisoner exhaust state remedies before applying for federal habeas corpus. *Ex parte Royall*, 117 U. S. 241 (1886); 28 U. S. C. § 2254; see *Fay* v. *Noia*, 372 U. S. 391, 415–420 (1963).

(1915), and more clearly in *Moore* v. *Dempsey*, 261 U. S. 86 (1923), this Court had recognized that a district court was authorized to look behind the bare record of a trial proceeding and conduct a factual hearing to determine the merits of alleged deprivations of constitutional rights [14]—a procedure that reached full flowering in *Johnson* v. *Zerbst*, 304 U. S. 458 (1938). Thus, by the time *McNally* was decided, the federal writ of habeas corpus was substantially a post-conviction device which could afford prompt adjudication of factual as well as legal issues. Keeping these purposes of the writ in mind, we turn to consideration of the *McNally* holding and the reasons which compel us to overrule it.

A federal jury had found McNally guilty of three counts of an indictment charging offenses under the Motor Vehicle Theft Act (now 18 U. S. C. §§ 2312–2313).[15] He had been sentenced to two years on the first count and four years each on the second and third counts, the sentences on the first and second counts to run con-

[14] The Court in *Frank* recognized that the Act of February 5, 1867, c. 28, 14 Stat. 385, substituted "for the bare legal review that seems to have been the limit of judicial authority under the common-law practice . . . a more searching investigation, in which the applicant is put upon his oath to set forth the truth of the matter respecting the causes of his detention, and the court, upon determining the actual facts, is to 'dispose of the party as law and justice require.'" 237 U. S., at 330–331. In *Moore*, the Court remanded the case to the District Court for determination of the truth of allegations that the pervading influence of a mob had denied the appellants a fair trial in the state court. 261 U. S., at 92.

[15] Because McNally was imprisoned by federal authorities, his application for habeas corpus relief could have rested on the clause of Rev. Stat. § 753 (1874) which authorized federal courts to entertain petitions from prisoners in the custody of the United States. However, the Court's interpretation of the custody requirement in *McNally* was equally applicable to state prisoners claiming their incarceration violated the Constitution. *E. g., Darr* v. *Burford*, 339 U. S. 200, 203 (1950).

currently and the sentence on the third consecutively. In his application in a district court for a writ of habeas corpus, McNally claimed that the indictment failed to state an offense as to the third count. He did not attack the convictions under the first and second counts. When he filed his petition he was serving under the second count. The lower courts denied relief on the merits. But this Court affirmed on a jurisdictional ground, holding that because McNally had not begun to serve the sentence on the third count—and therefore was not "in custody" under that sentence—his petition for relief was premature:

> "[W]ithout restraint which is unlawful, the writ may not be used. A sentence which the prisoner has not begun to serve cannot be the cause of restraint which the statute makes the subject of inquiry." 293 U. S., at 138.

The effect of this disposition was ameliorated somewhat by the Court's suggestion that McNally might seek relief by another route. *Id.*, at 140. See also *Holiday* v. *Johnston*, 313 U. S. 342, 349 (1941). But cf. *Ex parte Hull*, 312 U. S. 546 (1941). Moreover, McNally's challenge was directed at the face of the indictment. Therefore, postponement of adjudication of his claims probably would not have resulted in the loss of crucial evidence. But the harshness of a rule which may delay determination of federal claims for decades becomes obvious when applied to the cases of Rowe and Thacker. Their cases also exemplify the manner in which the decision in *McNally* cuts against the prior and subsequent development of the writ in the federal courts.

Both Rowe and Thacker allege that they were so inadequately represented at trial that they were denied the assistance of counsel in violation of the Sixth and Fourteenth Amendments. Petitioner concedes that, but for

McNally, respondents' allegations would entitle them to plenary hearings in the District Courts. Brief for Petitioner 6. Yet, under the current schedules of confinement, it is argued, neither Rowe nor Thacker may obtain adjudication of his claims until after 1990. By that time, dimmed memories or the death of witnesses is bound to render it difficult or impossible to secure crucial testimony on disputed issues of fact. Of course prejudice to meritorious claims resulting from the kind of delay which *McNally* imposes is not limited to situations involving ineffective assistance of counsel. To name but a few examples, factual determinations are often dispositive of claims of coerced confession, *e. g.*, *Reck* v. *Pate*, 367 U. S. 433 (1961), *Leyra* v. *Denno*, 347 U. S. 556 (1954); lack of competency to stand trial, *e. g.*, *Pate* v. *Robinson*, 383 U. S. 375 (1966); and denial of a fair trial, *e. g.*, *Sheppard* v. *Maxwell*, 384 U. S. 333 (1966). Postponement of the adjudication of such issues for years can harm both the prisoner and the State and lessens the probability that final disposition of the case will do substantial justice.[16] As the Court of Appeals observed:

> "Years hence, the prisoner, at least, may be expected to give testimonial support to the allegations of his petition, but if they are false in fact, the Commonwealth of Virginia may be unable to refute them because of the unavailability of records and of the testimony of responsible officials and participants in the trial. The greater the lapse of time, the more unlikely it becomes that the state could reprosecute if retrials are held to be necessary. It

[16] Even where resolution of constitutional claims turns on record evidence, loss or destruction of a relevant document or failure to transcribe the record over a period of years, cf. *Norvell* v. *Illinois*, 373 U. S. 420 (1963), could mean that a claim relegated to the limbo of prematurity might never be adequately determined.

> is to the great interest of the Commonwealth and to the prisoner to have these matters determined as soon as possible when there is the greatest likelihood the truth of the matter may be established." [17] 383 F. 2d, at 715.

Clearly, to the extent that the rule of *McNally* postpones plenary consideration of issues by the district courts, it undermines the character of the writ of habeas corpus as the instrument for resolving fact issues not adequately developed in the original proceedings. To that extent, it also undermines *Moore* v. *Dempsey, supra,* and is inconsistent with subsequent decisions of this Court which have reaffirmed *Moore*. *E. g., Johnson* v. *Zerbst,* 304 U. S. 458 (1938); *Brown* v. *Allen,* 344 U. S. 443 (1953); *Fay* v. *Noia,* 372 U. S. 391 (1963).

McNally is also at odds with the purpose of the writ of habeas corpus in another respect. As noted above, a principal aim of the writ is to provide for swift judicial review of alleged unlawful restraints on liberty. Calendar congestion, considerations of federalism, see, *e. g., Fay* v. *Noia,* 372 U. S., at 415–420; *Ex parte Royall,*

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[17] This consideration has led at least two States which previously followed the prematurity doctrine to reject it in recent years. See *Commonwealth ex rel. Stevens* v. *Myers,* 419 Pa. 1, 213 A. 2d 613 (1965); Ore. Rev. Stat. § 138.510 (1961). See also *Landreth* v. *Gladden,* 213 Ore. 205, 324 P. 2d 475 (1958). California does not follow the *McNally* rule. *In re Chapman,* 43 Cal. 2d 385, 273 P. 2d 817 (1954). Finally, while this case was under consideration in this Court, Virginia repudiated the prematurity doctrine by statute. See Va. S. No. 44, 1968 Sess., amending Va. Code Ann. § 8–596 (effective June 28, 1968). A committee of the American Bar Association which is inquiring into post-conviction remedies has recommended abandonment of the prematurity doctrine which it calls "one of the most frustrating elements of present post-conviction practice." Advisory Committee on Sentencing and Review, A. B. A. Project on Minimum Standards for Criminal Justice, Standards Relating to Post-Conviction Remedies 43 (Tent. Draft 1967).

117 U. S. 241 (1886), and the exigencies of appellate review account for largely unavoidable delays in the processing of criminal cases. But the prematurity rule of *McNally* in many instances extends without practical justification the time a prisoner entitled to release must remain in confinement. Rowe and Thacker eventually may establish that the convictions they challenge were obtained in violation of the Constitution. If they do, each day they are incarcerated under those convictions while their cases are in the courts will be time that they might properly have enjoyed as free men. Common sense dictates that prisoners seeking habeas corpus relief after exhausting state remedies should be able to do so at the earliest practicable time.

The foregoing analysis demonstrates that *McNally* is inconsistent with the purposes underlying the federal writ of habeas corpus. Moreover, in arriving at its decision, the Court in *McNally* relied in part upon an unnecessarily narrow interpretation of the habeas corpus statute. Standing alone, the limitation of § 2241 (c) (3)—that "[t]he writ of habeas corpus shall not extend to a prisoner unless . . . [h]e is in custody in violation of the Constitution"—is not free of ambiguity. However, in common understanding "custody" comprehends respondents' status for the entire duration of their imprisonment. Practically speaking, Rowe is in custody for 50 years, or for the aggregate of his 30- and 20-year sentences. For purposes of parole eligibility, under Virginia law he is incarcerated for 50 years. Va. Code Ann. § 53–251 (1967); see n. 3, *supra*. Nothing on the face of § 2241 militates against an interpretation which views Rowe and Thacker as being "in custody" under the aggregate of the consecutive sentences imposed on them. Under that interpretation, they are "in custody in violation of the Constitution" if any consecutive sentence they are scheduled to serve was imposed as the result

of a deprivation of constitutional rights. This approach to the statute is consistent with the canon of construction that remedial statutes should be liberally construed. It also eliminates the inconsistencies between purpose and practice which flow from the *McNally* holding. Meaningful factual hearings on alleged constitutional deprivations can be conducted before memories and records grow stale, and at least one class of prisoners will have the opportunity to challenge defective convictions and obtain relief without having to spend unwarranted months or years in prison.

We find unpersuasive the arguments made in *McNally* to support the narrower interpretation of the custody requirement. No prior decision of the Court was cited as clear authority for the prematurity doctrine.[18] To fill the gap, the Court relied on the history of the writ in England prior to 1789 and a line of reasoning whose unexamined premise was doubtful before *McNally* and was subsequently rejected. Both the historical and conceptual bases of the opinion are revealed in the Court's observation that "[d]iligent search of the English authorities and the digests before 1789 has failed to disclose any case where the writ was sought or used . . . as a means of securing the judicial decision of any question which, even if determined in the prisoner's favor, could

[18] Of the prior decisions of this Court cited in *McNally*, only *In re Swan*, 150 U. S. 637 (1893), suggested a rule of prematurity. Even in *Swan*, the Court held no more than that the prisoner was not entitled to immediate discharge from confinement merely because the sentencing judge had imposed an allegedly unauthorized fine in addition to a valid prison term. 150 U. S., at 653. In at least two cases, *Morgan* v. *Devine*, 237 U. S. 632 (1915), and *Ex parte Spencer*, 228 U. S. 652 (1913), the Court had reached the merits of habeas corpus applications by prisoners who had not served the valid portions of their sentences. Though relief was ultimately denied in *Morgan* and *Spencer*, they illustrate that the prior decisions of the Court by no means compelled the *McNally* result.

not have resulted in his immediate release." *McNally* v. *Hill*, 293 U. S., at 137–138. To the extent that the Court thought that the absence of eighteenth century English precedent demonstrated that McNally was not entitled to habeas corpus relief, the Court's reliance seems to have been misplaced. In light of the fact that English judges had no power to impose cumulative punishment in felony cases,[19] and apparently did not assume such power in misdemeanor cases until 1769,[20] it is not at all surprising that research failed to uncover a pre-1789 common-law analogy for McNally's petition for relief. In any event, the development of the writ of habeas corpus did not end in 1789. What we said of the writ in a similar context in *Jones* v. *Cunningham*, 371 U. S. 236 (1963), is equally applicable here.

> "[The writ] is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty." *Id.*, at 243.

Of course the excursion in *McNally* into history to determine that the writ of habeas corpus issued only to adjudicate entitlement to "immediate release" was not unnecessary. Though *McNally* held only that the petitioner did not meet the custody requirements of the statute, see *Walker* v. *Wainwright*, 390 U. S. 335 (1968), that holding rested in part on the premise that physical discharge from custody is the only relief available in a habeas corpus proceeding. But the statute does not deny the federal courts power to fashion appropriate relief other than immediate release. Since 1874, the habeas

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[19] See *Regina* v. *Albury*, [1951] 1 All E. R. 491 (Crim. App.); 1 J. Stephen, History of the Criminal Law of England 291–292 (1883).

[20] *Wilkes* v. *Rex*, 4 Bro. P. C. 360, 2 Eng. Rep. 244 (H. L. 1769).

corpus statute has directed the courts to determine the facts and dispose of the case summarily, "as law and justice require." Rev. Stat. § 761 (1874), superseded by 28 U. S. C. § 2243. Consistently with this command, this Court has held that a prisoner whose first-sentence parole was revoked upon a second conviction could challenge the second conviction in a habeas corpus proceeding though he would not be released if he prevailed, *Ex parte Hull,* 312 U. S. 546 (1941); that a person who was paroled after he filed his habeas corpus petition could still obtain relief from the restraints imposed by the parole conditions, *Jones* v. *Cunningham, supra;* and that a prisoner could attack the first of two consecutive sentences in a federal habeas corpus proceeding even though he would still be confined under the second sentence if he succeeded, *Walker* v. *Wainwright, supra.* See also *United States* v. *Pridgeon,* 153 U. S. 48, 63–64 (1894). Thus, to the extent that *McNally* relied on the notion that immediate physical release was the only remedy under the federal writ of habeas corpus, it finds no support in the statute and has been rejected by this Court in subsequent decisions.

We overrule *McNally* and hold that a prisoner serving consecutive sentences is "in custody" under any one of them for purposes of § 2241 (c)(3).[21] This interpretation is consistent with the statutory language and with the purpose of the writ of habeas corpus in the federal courts.

Affirmed.

[21] We intimate no views on the merits of respondents' underlying claims.

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LEVY, ADMINISTRATRIX *v.* LOUISIANA THROUGH THE CHARITY HOSPITAL OF LOUISIANA AT NEW ORLEANS BOARD OF ADMINISTRATORS ET AL.

APPEAL FROM THE SUPREME COURT OF LOUISIANA.

No. 508. Argued March 27, 1968.—Decided May 20, 1968.

Appellant, on behalf of five illegitimate children, brought this action under a Louisiana statute (La. Civ. Code Art. 2315) for the wrongful death of their mother. The trial court dismissed the suit and the Court of Appeal affirmed, holding that a surviving "child" under the statute did not include an illegitimate child, denial of whose right of recovery was "based on morals and general welfare because it discourages bringing children into the world out of wedlock." The State Supreme Court denied certiorari. *Held:* The statute as construed to deny a right of recovery under Art. 2315 by illegitimate children creates an invidious discrimination contravening the Equal Protection Clause of the Fourteenth Amendment, since legitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother. Pp. 70–72.

250 La. 25, 193 So. 2d 530, reversed.

Norman Dorsen argued the cause for appellant. With him on the brief were *Adolph J. Levy, Lawrence J. Smith,* and *Melvin L. Wulf.*

William A. Porteous III argued the cause for appellees. With him on the brief were *Jack P. F. Gremillion,* Attorney General of Louisiana, *Dorothy D. Wolbrette* and *L. K. Clement, Jr.,* Assistant Attorneys General, and *William A. Porteous, Jr.*

Briefs of *amici curiae,* urging reversal, were filed by *Leo Pfeffer* and *Joseph B. Robison* for the Executive Council of the Episcopal Church in the U. S. A. et al., and by *Harry D. Krause, Jack Greenberg,* and *Leroy D.*

Clark for the NAACP Legal Defense and Educational Fund, Inc., et al.

Brief of *amicus curiae*, urging affirmance, was filed by *Mr. Gremillion, pro se, William P. Schuler*, Second Assistant Attorney General, and *Mrs. Wolbrette* and *Mr. Clement* for the Attorney General of Louisiana.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Appellant sued on behalf of five illegitimate children to recover, under a Louisiana statute[1] (La. Civ. Code Ann. Art. 2315 (Supp. 1967)) for two kinds of damages as a result of the wrongful death of their mother: (1) the damages to them for the loss of their mother;

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[1] "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.

"The right to recover damages to property caused by an offense or quasi offense is a property right which, on the death of the obligee, is inherited by his legal, instituted, or irregular heirs, subject to the community rights of the surviving spouse.

"The right to recover all other damages caused by an offense or quasi offense, if the injured person dies, shall survive for a period of one year from the death of the deceased in favor of: (1) the surviving spouse and child or children of the deceased, or either such spouse or such child or children; (2) the surviving father and mother of the deceased, or either of them, if he left no spouse or child surviving; and (3) the surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child, or parent surviving. The survivors in whose favor this right of action survives may also recover the damages which they sustained through the wrongful death of the deceased. A right to recover damages under the provisions of this paragraph is a property right which, on the death of the survivor in whose favor the right of action survived, is inherited by his legal, instituted, or irregular heirs, whether suit has been instituted thereon by the survivor or not.

"As used in this article, the words 'child,' 'brother,' 'sister,' 'father,' and 'mother' include a child, brother, sister, father, and mother, by adoption, respectively."

and (2) those based on the survival of a cause of action which the mother had at the time of her death for pain and suffering. Appellees [2] are the doctor who treated her and the insurance company.

We assume in the present state of the pleadings that the mother, Louise Levy, gave birth to these five illegitimate children and that they lived with her; that she treated them as a parent would treat any other child; that she worked as a domestic servant to support them, taking them to church every Sunday and enrolling them, at her own expense, in a parochial school. The Louisiana District Court dismissed the suit. The Court of Appeal affirmed, holding that "child" in Article 2315 means "legitimate child," the denial to illegitimate children of "the right to recover" being "based on morals and general welfare because it discourages bringing children into the world out of wedlock." 192 So. 2d 193, 195. The Supreme Court of Louisiana denied certiorari. 250 La. 25, 193 So. 2d 530.

The case is here on appeal (28 U. S. C. § 1257 (2)); and we noted probable jurisdiction, 389 U. S. 925, the statute as construed having been sustained against challenge under both the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

We start from the premise that illegitimate children are not "nonpersons." They are humans, live, and have their being.[3] They are clearly "persons" within the meaning of the Equal Protection Clause of the Fourteenth Amendment.[4]

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[2] The State of Louisiana was dismissed from the action and exceptions relating to the Charity Hospital, at which the mother was treated, were continued indefinitely. No appeal was taken with respect to either of those defendants.

[3] See Note, The Rights of Illegitimates Under Federal Statutes, 76 Harv. L. Rev. 337 (1962).

[4] No State shall "deny to any person within its jurisdiction the equal protection of the laws."

While a State has broad power when it comes to making classifications (*Ferguson* v. *Skrupa*, 372 U. S. 726, 732), it may not draw a line which constitutes an invidious discrimination against a particular class. See *Skinner* v. *Oklahoma*, 316 U. S. 535, 541–542. Though the test has been variously stated, the end result is whether the line drawn is a rational one. See *Morey* v. *Doud*, 354 U. S. 457, 465–466.

In applying the Equal Protection Clause to social and economic legislation, we give great latitude to the legislature in making classifications. *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 489; *Morey* v. *Doud*, *supra*, at 465–466. Even so, would a corporation, which is a "person," for certain purposes, within the meaning of the Equal Protection Clause (*Pembina Mining Co.* v. *Pennsylvania*, 125 U. S. 181, 188) be required to forgo recovery for wrongs done its interests because its incorporators were all bastards? However that might be, we have been extremely sensitive when it comes to basic civil rights (*Skinner* v. *Oklahoma*, *supra*, at 541; *Harper* v. *Virginia Board of Elections*, 383 U. S. 663, 669–670) and have not hesitated to strike down an invidious classification even though it had history and tradition on its side. (*Brown* v. *Board of Education*, 347 U. S. 483; *Harper* v. *Virginia Board of Elections*, *supra*, at 669.) The rights asserted here involve the intimate, familial relationship between a child and his own mother. When the child's claim of damage for loss of his mother is in issue, why, in terms of "equal protection," should the tortfeasors go free merely because the child is illegitimate? Why should the illegitimate child be denied rights merely because of his birth out of wedlock? He certainly is subject to all the responsibilities of a citizen, including the payment of taxes and conscription under the Selective Service Act. How under our constitutional regime can he be denied correlative rights which other citizens enjoy?

Legitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother. These children, though illegitimate, were dependent on her; she cared for them and nurtured them; they were indeed hers in the biological and in the spiritual sense; in her death they suffered wrong in the sense that any dependent would.[5]

We conclude that it is invidious to discriminate against them when no action, conduct, or demeanor of theirs[6] is possibly relevant to the harm that was done the mother.[7]

Reversed.

[For dissenting opinion of MR. JUSTICE HARLAN, see *post*, p. 76.]

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[5] Under Louisiana law both parents are under a duty to support their illegitimate children. La. Civ. Code Ann. Arts. 239, 240 (1952).

[6] We can say with Shakespeare: "Why bastard, wherefore base? When my dimensions are as well compact, My mind as generous, and my shape as true, As honest madam's issue? Why brand they us With base? with baseness? bastardy? base, base?" King Lear, Act I, Scene 2.

[7] Under Louisiana's Workmen's Compensation Act (La. Rev. Stat. Ann. §§ 23:1231, 23:1252, 23:1253 (1964)) an illegitimate child, who is a dependent member of the deceased parent's family, may recover compensation for his death. See *Thompson* v. *Vestal Lumber & Mfg. Co.*, 208 La. 83, 22 So. 2d 842 (1945). Employers are entitled to recover from a wrongdoer workmen's compensation payments they make to the deceased's dependent illegitimate children. See *Board of Commissioners* v. *City of New Orleans*, 223 La. 199, 65 So. 2d 313 (1953); *Thomas* v. *Matthews Lumber Co.*, 201 So. 2d 357 (Ct. App. La. 1967).

GLONA *v.* AMERICAN GUARANTEE & LIABILITY INSURANCE CO. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 639. Argued March 27–28, 1968.—Decided May 20, 1968.

In this diversity action petitioner seeks damages for the alleged wrongful death in Louisiana of her illegitimate son. The trial court granted respondents' motion for summary judgment on the ground that under Louisiana law a mother had no right of action for the death of her illegitimate son. The Court of Appeals affirmed. *Held:* The Louisiana wrongful death statute as construed to bar recovery for damages to the parent of an illegitimate child while allowing such recovery to the parent of a legitimate child violates the Equal Protection Clause of the Fourteenth Amendment, there being no rational basis for the distinction. *Levy* v. *Louisiana, ante,* p. 68. Pp. 74–76.

379 F. 2d 545, reversed.

William F. Wessel argued the cause for petitioner. With him on the brief were *Leonard J. Fagot, Marvin C. Grodsky,* and *Benjamin E. Smith.*

David R. Normann argued the cause for respondents. With him on the brief were *Frank S. Normann* and *Margot Mazeau.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This suit was brought in the Federal District Court under the head of diversity jurisdiction to recover for a wrongful death suffered in an automobile accident in Louisiana. The plaintiff, a Texas domiciliary, was the mother of the victim, her illegitimate son. Had the Texas wrongful death statute [1] been applicable, it would, as construed, have authorized the action.[2] But sum-

[1] Tex. Rev. Civ. Stat. Ann. Art. 4675 (1952).

[2] The Court of Appeals so indicated in this case. 379 F. 2d, at

mary judgment was granted on the ground that under Louisiana law [3] the mother had no right of action for the death of her illegitimate son. The Court of Appeals affirmed, rejecting the claim that the discrimination violated the Equal Protection Clause of the Fourteenth Amendment. 379 F. 2d 545. We granted the petition for a writ of certiorari, 389 U. S. 969, in order to hear the case along with *Levy* v. *Louisiana, ante,* p. 68.

Louisiana follows a curious course in its sanctions against illegitimacy. A common-law wife is allowed to sue under the Louisiana wrongful death statute.[4] When a married woman gives birth to an illegitimate child, he is, with a few exceptions, conclusively presumed to be legitimate.[5] Louisiana makes no distinction between legitimate children and illegitimate children where incest is concerned.[6] A mother may inherit from an illegitimate

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546, n. 2. See *Galveston, H. & S. A. R. Co.* v. *Walker,* 48 Tex. Civ. App. 52, 106 S. W. 705 (1907).

[3] The applicable statutory provision is set out in *Levy* v. *Louisiana, ante,* at 69, n. 1. As the Court of Appeals noted, Article 2315 of the Louisiana Civil Code, providing for wrongful death recovery, gives a cause of action to "the surviving father and mother of the deceased, or either of them. . . ." The statute does not state "legitimate" father or "legitimate" mother, but the Louisiana courts have held that a decedent must be legitimate in order for an ascendant or sibling to recover for his death. *Youchican* v. *Texas & P. R. Co.,* 147 La. 1080, 86 So. 551 (1920); *Buie* v. *Hester,* 147 So. 2d 733 (Ct. App. La. 1962). See also *Green* v. *New Orleans, S. & G. I. R. Co.,* 141 La. 120, 74 So. 717 (1917); *Jackson* v. *Lindlom,* 84 So. 2d 101 (Ct. App. La. 1955). See also *Vaughan* v. *Dalton-Lard Lumber Co.,* 119 La. 61, 43 So. 926 (1907).

[4] *Chivers* v. *Couch Motor Lines,* 159 So. 2d 544 (Ct. App. La. 1964).

[5] La. Civ. Code Ann. Art. 184 (1952). See *Lambert* v. *Lambert,* 164 So. 2d 661 (Ct. App. La. 1964); *Harris* v. *Illinois Central R. Co.,* 220 F. 2d 734 (C. A. 5th Cir. 1955); cf. *Lewis* v. *Powell,* 178 So. 2d 769 (Ct. App. La. 1965).

[6] La. Rev. Stat. Ann. § 14:78 (1952).

child whom she has acknowledged and vice versa.[7] If the illegitimate son had a horse that was killed by the defendant and then died himself, his mother would have a right to sue for the loss of that property.[8] If the illegitimate son were killed in an industrial accident at his place of employment, the mother would be eligible for recovery under the Louisiana Workmen's Compensation Act, if she were a dependent of his.[9] Yet it is argued that since the legislature is dealing with "sin," it can deal with it selectively and is not compelled to adopt comprehensive or even consistent measures. See *McLaughlin* v. *Florida,* 379 U. S. 184, 191. In this sense the present case is different from the *Levy* case, where by mere accident of birth the innocent, although illegitimate, child was made a "nonperson" by the legislature, when it came to recovery of damages for the wrongful death of his mother.

Yet we see no possible rational basis (*Morey* v. *Doud,* 354 U. S. 457, 465–466) for assuming that if the natural mother is allowed recovery for the wrongful death of her illegitimate child, the cause of illegitimacy will be served. It would, indeed, be farfetched to assume that women have illegitimate children so that they can be compensated in damages for their death. A law which creates an open season on illegitimates in the area of automobile accidents gives a windfall to tortfeasors. But it hardly has a causal connection with the "sin," which is, we are told, the historic reason for the creation of the disability. To say that the test of equal protection should be the "legal" rather than the biological relationship is to avoid

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[7] La. Civ. Code Ann. Arts. 918, 922 (1952).

[8] La. Civ. Code Ann. Arts. 2315, 922 (1952 and Supp. 1967).

[9] La. Rev. Stat. Ann. §§ 23:1231, 23:1252, 23:1253 (1964); *Thompson* v. *Vestal Lumber & Mfg. Co.,* 208 La. 83, 119, 22 So. 2d 842, 854 (1945); see Note, 20 Tulane L. Rev. 145 (1945).

the issue. For the Equal Protection Clause necessarily limits the authority of a State to draw such "legal" lines as it chooses.

Opening the courts to suits of this kind may conceivably be a temptation to some to assert motherhood fraudulently. That problem, however, concerns burden of proof. Where the claimant is plainly the mother, the State denies equal protection of the laws to withhold relief merely because the child, wrongfully killed, was born to her out of wedlock.

Reversed.

MR. JUSTICE HARLAN, whom MR. JUSTICE BLACK and MR. JUSTICE STEWART join, dissenting.*

These decisions can only be classed as constitutional curiosities.

At common law, no person had a legally cognizable interest in the wrongful death of another person, and no person could inherit the personal right of another to recover for tortious injuries to his body.[1] By statute, Louisiana has created both rights in favor of certain classes of persons. The question in these cases is whether the way in which Louisiana has defined the classes of persons who may recover is constitutionally permissible. The Court has reached a negative answer to this question by a process that can only be described as brute force.

One important reason why recovery for wrongful death had everywhere to await statutory delineation is that the interest one person has in the life of another is inherently intractable. Rather than hear offers of proof of love and affection and economic dependence from every person who might think or claim that the bell had

*This opinion applies also to No. 508, *Levy* v. *Louisiana*, *ante*, p. 68.

[1] See *Van Beeck* v. *Sabine Towing Co.*, 300 U. S. 342, 344–345, and cases there cited.

tolled for him, the courts stayed their hands pending legislative action. Legislatures, responding to the same diffuseness of interests, generally defined classes of proper plaintiffs by highly arbitrary lines based on family relationships, excluding issues concerning the actual effect of the death on the plaintiff.[2]

Louisiana has followed the traditional pattern. There the actions lie in favor of the surviving spouse and children of the deceased, if any; if none, then in favor of the surviving parents of the deceased, if any; if none, then in favor of the deceased's brothers and sisters, if any; if none, then no action lies. According to this scheme, a grown man may sue for the wrongful death of parents he did not love,[3] even if the death relieves

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[2] An English statute, Lord Campbell's Act, 9 & 10 Vict., c. 93 (1846), "has served as the model for similar acts in most of the states in this country." F. Tiffany, Death By Wrongful Act 5 (2d ed., 1913). The statute provided that the action "shall be for the Benefit of the Wife, Husband, Parent, and Child . . . ." It is noteworthy that English and Canadian courts held the words "child" and "parent" to exclude illegitimate relationships. *Dickinson* v. *North Eastern R. Co.*, 2 Hurl. & Colt. 735, 9 L. T. R. (N. S.) 299; *Gibson* v. *Midland R. Co.*, 2 Ont. 658. A recent comprehensive survey of American law in the field comments that "[i]f there is a general rule today, it is probably that the word 'child' or 'children' when used in a statute pertaining to wrongful death beneficiaries, refers to a legitimate child or legitimate children, and thus only legitimates can recover for the wrongful death of their parents. This is merely an application of the principle that statutes patterned after Lord Campbell's Act which use the word 'kin' mean legitimate kin, and that where such statutes say 'father' or 'mother,' 'children,' 'brothers' or 'sisters,' they mean only legitimate father, mother, children, brothers or sisters." S. Speiser, Recovery for Wrongful Death 587 (1966).

[3] He may even, like Shakespeare's Edmund, have spent his life contriving treachery against his family. Supposing that the Bard had any views on the law of legitimacy, they might more easily be discerned from Edmund's character than from the words he utters in defense of the only thing he cares for, himself.

him of a great economic burden or entitles him to a large inheritance. But an employee who loses a job because of the death of his employer has no cause of action, and a minor child cared for by neighbors or relatives "as if he were their own son" does not therefore have a right to sue for their death.[4] Perhaps most dramatic, a surviving parent, for example, of a Louisiana deceased may sue if and only if there is no surviving spouse or child: it does not matter who loved or depended on whom, or what the economic situation of any survivor may be, or even whether the spouse or child elects to sue.[5] In short, the whole scheme of the Louisiana wrongful death statute, which is similar in this respect to that of most other States, makes everything the Court says about affection and nurture and dependence altogether irrelevant. The only question in any case is whether the plaintiff falls within the classes of persons to whom the

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[4] Numerous Louisiana cases, reflecting the difficulty of attempting to determine the "real" interest of one person in the death of another, have insisted upon strict conformity to the required statutory relationship, and stated that the statute may not be extended by interpretation to analogous cases. *E. g., Bradley* v. *Swift & Co.*, 167 La. 249, 119 So. 37 (1928). As it happens, this Court has had occasion to recognize Louisiana's interest in strict construction. See *Mobile Life Ins. Co.* v. *Brame*, 95 U. S. 754, holding that an insurance company, having paid the insurance after the wrongful death of its insured, had no cause of action against the tortfeasor under Louisiana law.

[5] See, *e. g., Burthlong* v. *Huber*, 4 So. 2d 480; *Doucet* v. *Travelers Ins. Co.*, 91 F. Supp. 864. The Court speaks in *Levy* of tortfeasors going free. However, the deceased in that case left a legitimate parent. Under the Court's opinion, the right of legitimate and perhaps dependent parents to sue will henceforth be cut off by the mere existence of an illegitimate child, though the child be a self-supporting adult, and though the child elect not to sue. Incidentally, the burden of proving the nonexistence of such a child will be on the plaintiff parent. *Trahan* v. *Southern Pacific Co.*, 209 F. Supp. 334.

State has accorded a right of action for the death of another.

Louisiana has chosen, as have most other States in one respect or another, to define these classes of proper plaintiffs in terms of their legal rather than their biological relation to the deceased. A man may recover for the death of his wife, whether he loved her or not, but may not recover for the death of his paramour.[6] A child may recover for the death of his adopted parents. An illegitimate may recover for the wrongful death of a parent who has taken a few hours to acknowledge him formally, but not for the death of a person who he claims is his parent but who has not acknowledged him.[7] A parent may recover for the death of an illegitimate child he has acknowledged, but not for the death of an illegitimate child whom he did not bother to acknowledge until the possibility of tort recovery arose.

The Court today, for some reason which I am at a loss to understand, rules that the State must base its arbitrary definition of the plaintiff class on biological rather than legal relationships. Exactly how this makes the Louisiana scheme even marginally more "rational" is not

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[6] *Vaughan* v. *Dalton-Lard Lumber Co.*, 119 La. 61, 43 So. 926 (1907). At the same time, a wife may recover for the death of a man to whom she is lawfully married, although she is not dependent on him for support and, indeed, is living adulterously with someone else. *Jones* v. *Massachusetts Bonding & Ins. Co.*, 55 So. 2d 88.

[7] In *Thompson* v. *Vestal Lumber & Mfg. Co.*, 16 So. 2d 594, 596, aff'd, 208 La. 83, 22 So. 2d 842 (1944), the court stated: "Children referred to in this law [the wrongful death statute] include only those who are the issue of lawful wedlock or who, being illegitimate, have been acknowledged or legitimated pursuant to methods expressly established by law." Article 203 of the Louisiana Civil Code provides that children may be acknowledged by a declaration, by either or both parents, executed in the presence of a notary public and two witnesses.

clear, for neither a biological relationship nor legal acknowledgment is indicative of the love or economic dependence that may exist between two persons. It is, frankly, preposterous to suggest that the State has made illegitimates into "nonpersons," or that, by analogy with what Louisiana has done here it might deny illegitimates constitutional rights or the benefits of doing business in corporate form.[8] The rights at issue here stem from the existence of a family relationship, and the State has decided only that it will not recognize the family relationship unless the formalities of marriage, or of the acknowledgment of children by the parent in question, have been complied with.

There is obvious justification for this decision. If it be conceded, as I assume it is, that the State has power to provide that people who choose to live together should go through the formalities of marriage and, in default, that people who bear children should acknowledge them, it is logical to enforce these requirements by declaring that the general class of rights that are dependent upon family relationships shall be accorded only when the formalities as well as the biology of those relationships are present. Moreover, and for many of the same reasons why a State is empowered to require formalities in the first place, a State may choose to simplify a particular proceeding by reliance on formal papers rather than a contest of proof.[9] That suits for wrongful death,

[8] A more obvious analogy from the law of corporations than the rather farfetched example the Court has suggested is the elementary rule that the benefits of doing business in corporate form may be denied, to the willful, the negligent, and the innocent alike, if the formalities of incorporation have not been properly complied with.

[9] Even where liability arises under a federal statute defining rights in terms of a family relationship to the deceased, federal courts have generally looked to the law and the formalities of the appropriate State. In *Seaboard Air Line* v. *Kenney*, 240 U. S. 489, arising under the Federal Employers' Liability Act, 35 Stat. 65, as amended, 36

actions to determine the heirs of intestates, and the like, must as a constitutional matter deal with every claim of biological paternity or maternity on its merits is an exceedingly odd proposition.

The Equal Protection Clause states a complex and difficult principle. Certain classifications are "inherently suspect," which I take to mean that any reliance upon them in differentiating legal rights requires very strong affirmative justification. The difference between a child who has been formally acknowledged and one who has not is hardly one of these. Other classifications are impermissible because they bear no intelligible proper relation to the consequences that are made to flow from them. This does not mean that any classification this Court thinks could be better drawn is unconstitutional. But even if the power of this Court to improve

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Stat. 291, this Court relied upon the North Carolina determination that the "next of kin" of an illegitimate deceased were his half siblings rather than his father. In *De Sylva* v. *Ballentine*, 351 U. S. 570, arising under the Copyright Act, 61 Stat. 652, 17 U. S. C. § 1 *et seq.*, we held that the word "children" in § 24 of that federal statute should be defined by reference to California law; California law provided that an illegitimate who had been acknowledged in writing by his father could inherit from him; since the illegitimate involved in *De Sylva* had been acknowledged, we held he was included within the statutory term. Two Justices, concurring in the unanimous result, argued that it was not proper to look to state law for a definition of the federal statutory term "children." Nowhere, however, was it suggested that we look to the Constitution. In *Bell* v. *Tug Shrike*, 332 F. 2d 330, the Fourth Circuit looked to Virginia law to determine whether the plaintiff was a "widow" entitled to bring suit under the Jones Act, 41 Stat. 1007, 46 U. S. C. § 688. Plaintiff had "married" her "husband" at a time when he was already married. Although the pre-existing marriage was later dissolved by divorce, after which plaintiff continued to live with the "husband," Virginia does not recognize common-law marriages. Consequently, plaintiff was held not to be a "widow." There was no suggestion that equal protection was in any way involved.

on the lines that Congress and the States have drawn were very much broader than I consider it to be, I could not understand why a State which bases the right to recover for wrongful death strictly on family relationships could not demand that those relationships be formalized.

I would affirm the decisions of the state court and the Court of Appeals for the Fifth Circuit.

Syllabus.

COMMISSIONER OF INTERNAL REVENUE *v.* GORDON ET UX.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 760. Argued April 4, 1968.—Decided May 20, 1968.*

Pacific Telephone & Telegraph Co. (Pacific), a subsidiary of American Telephone & Telegraph Co., which owned about 90% of Pacific's stock, transferred certain of its assets to a new company, Pacific Northwest Bell Telephone Co. (Northwest), in exchange for all Northwest's common stock, and debt paper. In 1961 Pacific distributed to its shareholders rights to purchase about 57% of Northwest's common stock at $16 a share, which was below its market value. Pacific advised its stockholders that "it expected that within about three years . . . the Company by one or more offerings will offer for sale the balance of such stock." It also reported that the Internal Revenue Service had ruled that stockholders who sold rights distributed to them would receive taxable income in the amount of the proceeds of sale, and that stockholders who exercised rights would receive taxable income in the amount of the difference between $16 and the fair market value per share of Northwest stock obtained. In 1963 the remaining Northwest stock was similarly offered to Pacific stockholders through rights. Respondents in No. 760 were minority stockholders of Pacific who received rights pursuant to the 1961 distribution; they sold four rights and exercised the balance. Petitioners in No. 781, who also received rights in 1961, exercised them all. None of these individuals reported any income from these transactions on their tax returns and the Commissioner of Internal Revenue asserted deficiencies. The Tax Court upheld the taxpayers' contention that the 1961 spinoff distribution met the requirements of § 355 of the Internal Revenue Code of 1954, with the result that no gain should be recognized on the receipt or exercise of the rights. The Tax Court held that the sale of the four rights did result in ordinary income. No. 781 was appealed to the Court of Appeals for the Ninth Circuit, which reversed the Tax Court and held that the difference between $16

*Together with No. 781, *Baan et ux.* v. *Commissioner of Internal Revenue*, on certiorari to the United States Court of Appeals for the Ninth Circuit.

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and fair market value was taxable income. No. 760 was appealed to the Second Circuit, which sustained the Tax Court on this point, but held the amount received from the sale of the rights was taxable as a capital gain rather than income. *Held:*

1. When a corporation sells corporate property to stockholders or their assignees at less than its fair market value, thus diminishing the corporation's net worth, it is engaging in a "distribution of property," and such a sale results in a dividend to shareholders unless some specific exception applies. Pp. 88–91.

2. Section 355 of the Code does not provide an exception for the 1961 distribution. Pp. 91–98.

(a) The 1961 distribution did not transfer "all" the Northwest stock nor did it transfer "control" (defined in § 368 (c) as 80%), within the meaning of § 355 (a)(1)(D). Pp. 91–95.

(b) For an initial transfer of less than a controlling interest to be treated as merely the first step in the divestiture of control it must be clearly identifiable as such at the time it is made and there must be a binding commitment to take the later steps, which was not the situation here. Pp. 95–98.

(c) Since receipt and exercise of the rights produced ordinary income, receipt and sale of the rights also resulted in income taxable at ordinary rates. P. 98.

No. 760, 382 F. 2d 499, reversed; No. 781, 382 F. 2d 485, affirmed.

Solicitor General Griswold argued the cause for petitioner in No. 760 and for respondent in No. 781. With him on the briefs were *Assistant Attorney General Rogovin, Harris Weinstein, Gilbert E. Andrews,* and *Martin T. Goldblum.*

Harry R. Horrow argued the cause for respondents in No. 760 and for petitioners in No. 781. With him on the briefs were *Francis N. Marshall* and *Stephen J. Martin.*

MR. JUSTICE HARLAN delivered the opinion of the Court.

These cases, involving the interpretation of § 355 of the Internal Revenue Code of 1954, have an appropriately complex history.

American Telephone and Telegraph Company (hereafter A. T. & T.) conducts its local communications business through corporate subsidiaries. Prior to July 1, 1961, communications services in California, Oregon, Washington, and Idaho were provided by Pacific Telephone and Telegraph Company (hereafter Pacific). A. T. & T. held about 90% of the common stock of Pacific at all relevant times. The remainder was widely distributed.

Early in 1961, it was decided to divide Pacific into two separate corporate subsidiaries of A. T. & T. The plan was to create a new corporation, Pacific Northwest Bell Telephone Company (hereafter Northwest) to conduct telephone business in Oregon, Washington, and Idaho, leaving the conduct of the California business in the hands of Pacific. To this end, Pacific would transfer all its assets and liabilities in the first three States to Northwest, in return for Northwest common stock and debt paper. Then, Pacific would transfer sufficient Northwest stock to Pacific shareholders to pass control of Northwest to the parent company, A. T. & T.

Pacific had, however, objectives other than fission. It wanted to generate cash to pay off existing liabilities and meet needs for capital, but not to have excess cash left over. It also feared that a simple distribution of the Northwest stock would encounter obstacles under California corporation law.[1] Consequently, the "Plan for Reorganization" submitted to Pacific's shareholders on

[1] The record indicates that Pacific's attorneys had advised that if Pacific distributed the Northwest shares without payment of consideration by Pacific's shareholders, the distribution would have to be charged to earned surplus; the attorneys further advised that Pacific had insufficient earned surplus for this purpose, and that if this difficulty were avoided by creation of a reduction surplus, the reduction surplus would, under California law, have to be used first to redeem Pacific's preferred shares.

February 27, 1961, had two special features. It provided that only about 56% of the Northwest common stock would be offered to Pacific shareholders immediately after the creation of Northwest. It also provided that, instead of simply distributing Northwest stock pro rata to shareholders, Pacific would distribute to its shareholders transferable rights entitling their holders to purchase Northwest common from Pacific at an amount to be specified by Pacific's Board of Directors, but expected to be below the fair market value of the Northwest common.

In its February 27 statement to shareholders, Pacific said that it was seeking a ruling from the Internal Revenue Service

> "with respect to the tax status of the rights to purchase which will be issued in connection with the offerings of capital stock of the New Company to shareholders of the Company . . . ."

The statement warned, however, that "[t]axable income to the holders of such shares may result with respect to such rights."

The plan was approved by Pacific's shareholders on March 24, 1961. Pacific transferred its assets and liabilities in Oregon, Washington, and Idaho to Northwest, and ceased business in those States on June 30, 1961. On September 29, 1961, Pacific issued to its common stockholders one right for each outstanding share of Pacific stock. These rights were exercisable until October 20, 1961. Six rights plus a payment of $16 were required to purchase one share of Northwest common. The rights issued in 1961 were sufficient to transfer about 57% of the Northwest stock.

By September 29, 1961, the Internal Revenue Service had ruled that shareholders who sold rights would real-

ize ordinary income in the amount of the sales price, and that shareholders who exercised rights would realize ordinary income in the amount of the difference between $16 paid in and the fair market value, measured as of the date of exercise, of the Northwest common received. The prospectus accompanying the distributed rights informed Pacific shareholders of this ruling.

On June 12, 1963, the remaining 43% of the Northwest stock was offered to Pacific shareholders. This second offering was structured much as the first had been, except that eight rights plus $16 were required to purchase one share of Northwest.

The Gordons, respondents in No. 760, and the Baans, petitioners in No. 781, were minority shareholders of Pacific as of September 29, 1961. In the rights distribution that occurred that day the Gordons received 1,540 rights under the plan. They exercised 1,536 of the rights on October 5, 1961, paying $4,096 to obtain 256 shares of Northwest, at a price of $16 plus six rights per share. The average price of Northwest stock on the American Stock Exchange was $26 per share on October 5. On the same day, the Gordons sold the four odd rights for $6.36. The Baans received 600 rights on September 29, 1961. They exercised them all on October 11, 1961, receiving 100 shares of Northwest in return for their 600 rights and $1,600. On October 11, the agreed fair market value of one Northwest share was $26.94.

In their federal income tax returns for 1961, neither the Gordons nor the Baans reported any income upon the receipt of the rights or upon exercising them to obtain Northwest stock at less than its fair market value. The Gordons also did not report any income on the sale of the four rights. The Commissioner asserted deficiencies against both sets of taxpayers. He contended, in a joint proceeding in the Tax Court, that the taxpayers received

ordinary income in the amount of the difference between the sum they paid in exercising their rights and the fair market value of the Northwest stock received. He contended further that the Gordons realized ordinary income in the amount of $6.36, the sales price, upon the sale of their four odd rights.

The Tax Court upheld the taxpayers' contention that the 1961 distribution of Northwest stock met the requirements of § 355 of the Code, with the result that no gain or loss should be recognized on the receipt by them or their exercise of the rights. The Tax Court held, however, that the Gordons' sale of the four odd rights resulted in ordinary income to them. The Commissioner appealed the *Baan* case to the Court of Appeals for the Ninth Circuit, and the *Gordon* case to the Court of Appeals for the Second Circuit; in the latter, the Gordons cross-appealed. The Ninth Circuit reversed the Tax Court, holding that the spread between $16 and fair market value was taxable as ordinary income to the Baans. The Second Circuit disagreed, sustaining the Tax Court on this point in the *Gordon* case, Judge Friendly dissenting. The Second Circuit went on to hold that the amount received by the Gordons for the four odd rights was taxable as a capital gain rather than as ordinary income, reversing the Tax Court on this point.

Because of the conflict, we granted certiorari. 389 U. S. 1033, 1034. We affirm the decision of the Court of Appeals for the Ninth Circuit, and reverse the decision of the Court of Appeals for the Second Circuit on both points.

Under §§ 301 and 316 of the Code, subject to specific exceptions and qualifications provided in the Code, any distribution of property by a corporation to its shareholders out of accumulated earnings and profits is a divi-

dend taxable to the shareholders as ordinary income.[2] Every distribution of corporate property, again except as otherwise specifically provided, "is made out of earnings and profits to the extent thereof."[3] It is here agreed that on September 28, 1961, Pacific's accumulated earnings and profits were larger in extent than the total amount the Commissioner here contends was a dividend—the difference between the fair market value of all Northwest stock sold in 1961 and the total amount, at $16 per share, paid in by purchasers.

Whether the actual dividend occurs at the moment when valuable rights are distributed or at the moment when their value is realized through sale or exercise, it is clear that when a corporation sells corporate property to stockholders or their assignees at less than its fair market value, thus diminishing the net worth of the corporation, it is engaging in a "distribution of property" as that term is used in § 316.[4] Such a sale thus results in a

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[2] Section 301 (a) provides as follows:

"Except as otherwise provided in this chapter, a distribution of property (as defined in section 317 (a)) made by a corporation to a shareholder with respect to its stock shall be treated in the manner provided in subsection (c)."

Section 317 (a) provides that "the term 'property' means money, securities, and any other property . . . ." Section 301 (c) provides that the "portion of the distribution which is a dividend (as defined in section 316) shall be included in gross income." Section 316 says that "the term 'dividend' means any distribution of property made by a corporation to its shareholders—(1) out of its earnings and profits accumulated after February 28, 1913, or . . . ."

[3] Section 316 (a) provides in part as follows:

"Except as otherwise provided in this subtitle, every distribution is made out of earnings and profits to the extent thereof . . . ."

[4] See, *e. g.*, *Choate* v. *Commissioner*, 129 F. 2d 684 (C. A. 2d Cir.). In *Palmer* v. *Commissioner*, 302 U. S. 63, 69, this Court said:

"While a sale of corporate assets to stockholders is, in a literal sense, a distribution of its property, such a transaction does not

dividend to shareholders unless some specific exception or qualification applies. In particular, it is here agreed that the spread was taxable to the present taxpayers unless the distribution of Northwest stock by Pacific met the requirements for nonrecognition stated in § 355, or § 354, or § 346 (b) of the Code.[5] Since the Tax Court

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necessarily fall within the statutory definition of a dividend. For a sale to stockholders may not result in any diminution of its net worth and in that case cannot result in any distribution of its profits.

"On the other hand such a sale, if for substantially less than the value of the property sold, may be as effective a means of distributing profits among stockholders as the formal declaration of a dividend."

In *Palmer,* rights were distributed entitling shareholders to purchase from the corporation shares of stock in another corporation. Finding that the sales price represented the reasonable value of the shares at the time the corporation committed itself to sell them, this Court found no dividend. It held that the mere issue of rights was not a dividend. It has not, however, been authoritatively settled whether an issue of rights to purchase at less than fair market value itself constitutes a dividend, or the dividend occurs only on the actual purchase. In the present case this need not be decided.

[5] It is important to begin from this premise. In our view, the Court of Appeals for the Second Circuit erred in its approach to the § 355 problem because it assumed, at the outset, that the Commissioner essentially sought to tax a transaction that brought no "income" to Pacific shareholders. Whether the shareholders received income, however, cannot in practice be determined in the abstract, before looking at § 355.

Any common shareholder in some sense "owns" a fraction of the assets of the corporation in which he holds stock, including those assets that reflect accumulated corporate earnings. Earnings are not taxed to the shareholder when they accrue to the corporation, but instead when they are passed to shareholders individually through dividends. Consequently it does not help to note, as the Second Circuit here did, that the distribution of Northwest stock merely changed the form of ownership that Pacific's shareholders enjoyed and did not increase their wealth. This is only very

concluded that the requirements of § 355 had been met, it did not reach taxpayers' alternative contentions. Under the disposition that we make here upon the § 355 question, these alternative contentions remain open for further proceedings in the Tax Court.

Section 355 provides that certain distributions of securities of corporations controlled by the distributing corporation do not result in recognized gain or loss to the distributee shareholders.[6] The requirements of the

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roughly true at best, but in the rough sense in which it is here true, it is true of any dividend. The question is not whether a shareholder ends up with "more" but whether the change in the form of his ownership represents a transfer to him, by the corporation, of assets reflecting its accumulated earnings and profits.

There may be a genuine theoretical difference between a change in form representing a mere corporate fission, separating what the shareholder owns into two smaller but essentially similar parts, and a change in form representing a dividend, separating what a shareholder owns *qua* shareholder from what he owns as an individual. This difference, however, must be defined by objectively workable tests, such as Congress supplied in § 355. Neither the Second Circuit nor the taxpayers have suggested any other way of identifying a true fission.

[6] Sec. 355. Distribution of stock and securities of a controlled corporation.

(a) Effect on distributees.

(1) General rule.

If—

(A) a corporation (referred to in this section as the "distributing corporation")—

(i) distributes to a shareholder, with respect to its stock, or

(ii) distributes to a security holder, in exchange for its securities, solely stock or securities of a corporation (referred to in this section as "controlled corporation") which it controls immediately before the distribution,

(B) the transaction was not used principally as a device for the distribution of the earnings and profits of the distributing corporation or the controlled corporation or both (but the mere fact that subsequent to the distribution stock or securities in one or more of such corporations are sold or exchanged by all or some of the dis-

section are detailed and specific, and must be applied with precision. It is no doubt true, as the Second Circuit emphasized, that the general purpose of the section was to distinguish corporate fission from the distribution of

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tributees (other than pursuant to an arrangement negotiated or agreed upon prior to such distribution) shall not be construed to mean that the transaction was used principally as such a device),

(C) the requirements of subsection (b) (relating to active business) are satisfied, and

(D) as part of the distribution, the distributing corporation distributes—

(i) all of the stock and securities in the controlled corporation held by it immediately before the distribution, or

(ii) an amount of stock in the controlled corporation constituting control within the meaning of section 368 (c), and it is established to the satisfaction of the Secretary or his delegate that the retention by the distributing corporation of stock (or stock and securities) in the controlled corporation was not in pursuance of a plan having as one of its principal purposes the avoidance of Federal income tax, then no gain or loss shall be recognized to (and no amount shall be includible in the income of) such shareholder or security holder on the receipt of such stock or securities.

(2) Non pro rata distributions, etc.

Paragraph (1) shall be applied without regard to the following:

(A) whether or not the distribution is pro rata with respect to all of the shareholders of the distributing corporation,

(B) whether or not the shareholder surrenders stock in the distributing corporation, and

(C) whether or not the distribution is in pursuance of a plan of reorganization (within the meaning of section 368 (a)(1)(D)).

(3) Limitation.

Paragraph (1) shall not apply if—

(A) the principal amount of the securities in the controlled corporation which are received exceeds the principal amount of the securities which are surrendered in connection with such distribution, or

(B) securities in the controlled corporation are received and no securities are surrendered in connection with such distribution.

For purposes of this section (other than paragraph (1)(D) of this subsection) and so much of section 356 as relates to this section,

earnings and profits. However, although a court may have reference to this purpose when there is a genuine question as to the meaning of one of the requirements Congress has imposed, a court is not free to disregard requirements simply because it considers them redundant or unsuited to achieving the general purpose in a particular case. Congress has abundant power to provide that a corporation wishing to spin off a subsidiary

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stock of a controlled corporation acquired by the distributing corporation by reason of any transaction which occurs within 5 years of the distribution of such stock and in which gain or loss was recognized in whole or in part, shall not be treated as stock of such controlled corporation, but as other property.

(4) Cross reference.

For treatment of the distribution if any property is received which is not permitted to be received under this subsection (including an excess principal amount of securities received over securities surrendered), see section 356.

(b) Requirements as to active business.

(1) In general.

Subsection (a) shall apply only if either—

(A) the distributing corporation, and the controlled corporation (or, if stock of more than one controlled corporation is distributed, each of such corporations), is engaged immediately after the distribution in the active conduct of a trade or business, or

(B) immediately before the distribution, the distributing corporation had no assets other than stock or securities in the controlled corporations and each of the controlled corporations is engaged immediately after the distribution in the active conduct of a trade or business.

(2) Definition.

For purposes of paragraph (1), a corporation shall be treated as engaged in the active conduct of a trade or business if and only if—

(A) it is engaged in the active conduct of a trade or business, or substantially all of its assets consist of stock and securities of a corporation controlled by it (immediately after the distribution) which is so engaged,

(B) such trade or business has been actively conducted throughout the 5-year period ending on the date of the distribution,

(C) such trade or business was not acquired within the period

must, however bona fide its intentions, conform the details of a distribution to a particular set of rules.

The Commissioner contends that the 1961 distribution of Northwest stock failed to qualify under § 355 in several respects.[7] We need, however, reach only one. Section 355 (a)(1)(D) requires that, in order to qualify for nonrecognition of gain or loss to shareholders, the distribution must be such that

> "as part of the distribution, the distributing corporation distributes—
>
> "(i) all of the stock and securities in the controlled corporation held by it immediately before the distribution, or

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described in subparagraph (B) in a transaction in which gain or loss was recognized in whole or in part, and

(D) control of a corporation which (at the times of acquisition of control) was conducting such trade or business—

(i) was not acquired directly (or through one or more corporations) by another corporation within the period described in subparagraph (B), or

(ii) was so acquired by another corporation within such period, but such control was so acquired only by reason of transactions in which gain or loss was not recognized in whole or in part, or only by reason of such transactions combined with acquisitions before the beginning of such period.

[7] The Commissioner contends, first, that Pacific did not distribute "solely stock or securities" as required by § 355 (a)(1)(A), because it distributed rights rather than stock. He contends, second, that Pacific did not distribute the Northwest stock "to a shareholder, with respect to its stock" as required by § 355 (a)(1)(A)(i), because it did not distribute the stock to shareholders but sold it to holders of transferable rights, for cash consideration. He contends, third, that Northwest did not meet the quantity requirements of § 355 (a)(1)(D) because it parted with only 57% of the stock in 1961.

Any one of these arguments, if established, would support the result the Commissioner seeks. The Court of Appeals for the Second Circuit perforce rejected all three. The Court of Appeals for the Ninth Circuit accepted all three. We reach only the last.

"(ii) an amount of stock in the controlled corporation constituting control within the meaning of section 368 (c), and . . . ."

Section 368 (c) provides in relevant part that

"the term 'control' means the ownership of stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote and at least 80 percent of the total number of shares of all other classes of stock of the corporation." [8]

On September 28, 1961, the day before the first rights distribution, Pacific owned all of the common stock of Northwest, the only class of securities that company had issued. The 1961 rights offering contemplated transferring, and succeeded in transferring, about 57% of the Northwest common to Pacific shareholders. It therefore could not be clearer that this 1961 distribution did not transfer "all" of the stock of Northwest held by Pacific prior to it, and did not transfer "control" as that term is defined in § 368 (c).

Nevertheless, taxpayers contend, and the Second Circuit agreed, that the requirements of subsection (a)(1)(D) were here met because Pacific distributed the remaining 43% of the Northwest stock in 1963. The court said that the purpose of the subsection "in no way requires

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[8] In the Tax Court, the Commissioner did not argue that Pacific had failed to meet the requirement that it distribute at least 80% of the Northwest stock, but rested upon his other arguments against applying § 355. When the Tax Court rejected these arguments, the Commissioner raised the 80% question, as well as his other arguments in both Courts of Appeals. Both considered the point on the merits, dividing on it as on the others. Since the general issue of the applicability of § 355 has been in the case since its inception, taxpayers do not contend that the 80% question is not properly before this Court. Since the record leaves no disputed issue of fact with respect to this question, we find it proper to decide it here without reference to a trier of fact.

a single distribution." [9] The court apparently concluded that so long as it appears, at the time the issue arises, that the parent corporation has in fact distributed all of the stock of the subsidiary, the requirements of § (a)(1)(D)(i) have been satisfied.

We are forced to disagree. The Code requires that "the distribution" divest the controlling corporation of all of, or 80% control of, the controlled corporation. Clearly, if an initial transfer of less than a controlling interest in the controlled corporation is to be treated for tax purposes as a mere first step in the divestiture of control, it must at least be identifiable as such at the time it is made. Absent other specific directions from Congress, Code provisions must be interpreted so as to conform to the basic premise of annual tax accounting.[10] It would be wholly inconsistent with this premise to hold that the essential character of a transaction, and its tax impact, should remain not only undeterminable but unfixed for an indefinite and unlimited period in the future, awaiting events that might or might not happen. This requirement that the character of a transaction be determinable does not mean that the entire divestiture must necessarily occur within a single tax year. It does, however, mean that if one transaction is to be characterized as a "first step" there must be a binding commitment to take the later steps.[11]

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[9] 382 F. 2d 499, 507.

[10] See *Burnet* v. *Sanford & Brooks Co.*, 282 U. S. 359, 363–365.

[11] The Commissioner contends that a multistep divestiture presents special problems in preventing bailouts of earnings and profits. The Second Circuit, recognizing such potential problems, held that they can be dealt with under § (a)(1)(B), which provides that nonrecognition shall result only when it appears that

"the transaction was not used principally as a device for the distribution of the earnings and profits of the distributing corporation or the controlled corporation or both . . . ."

Congress may, of course, have chosen not to leave problems created by multistep divestitures to specific adjudication under this "device"

Here, it was little more than a fortuity that, by the time suit was brought alleging a deficiency in taxpayers' 1961 returns, Pacific had distributed the remainder of the stock. The plan for reorganization submitted to shareholders in 1961 promised that 56% of that stock would be distributed immediately. The plan went on,

> "It is expected that within about three years after acquiring the stock of the New Company, the Company by one or more offerings will offer for sale the balance of such stock, following the procedures described in the preceding paragraph. The proceeds from such sales will be used by the Company to repay advances then outstanding and for general corporate purposes including expenditures for extensions, additions and improvements to its telephone plant.
>
> "The prices at which the shares of the New Company will be offered pursuant to the offerings referred to . . . will be determined by the Board of Directors of the Company at the time of each offering."

It was further stated that such subsequent distributions would occur "[a]t a time or times related to its [Pacific's] need for new capital." Although there is other language in the plan that might be interpreted as preventing Pacific management from dealing with the Northwest stock in any way inconsistent with eventual sale to Pacific shareholders, there is obviously no promise to sell any particular amount of stock, at any particular time, at any particular price. If the 1961 distribution played a part in what later proved to be a total divestiture of the Northwest stock, it was not, in 1961, either

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subsection, but to require *both* a unitary divestiture *and* satisfaction of the "device" requirement. Whether § (a)(1)(D) would prohibit or limit a divestiture of control committed from the outset but spread over a series of steps is a problem we need not reach.

a total divestiture or a step in a plan of total divestiture.

Accordingly, we hold that the taxpayers, having exercised rights to purchase shares of Northwest from Pacific in 1961, must recognize ordinary income in that year in the amount of the difference between $16 per share and the fair market value of a share of Northwest common at the moment the rights were exercised.

The second question presented by the petition in No. 760, whether the $6.36 received by taxpayers Gordon upon the sale of four rights was taxable as ordinary income, as a capital gain, or not at all, does not require extended discussion in light of our view upon the first question. Since receipt and exercise of the rights would have produced ordinary income, receipt and sale of the rights, constituting merely an alternative route to realization, also produced income taxable at ordinary rates. *Helvering* v. *Horst*, 311 U. S. 112; *Gibson* v. *Commissioner*, 133 F. 2d 308 (C. A. 2d Cir.).

The judgment of the Court of Appeals for the Second Circuit is reversed. The judgment of the Court of Appeals for the Ninth Circuit is affirmed.

It is so ordered.

MR. JUSTICE MARSHALL took no part in the consideration or decision of these cases.

Syllabus.

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA ET AL. *v.* CARROLL ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 309. Argued March 4, 1968.—Decided May 20, 1968.*

Respondents in No. 309, four orchestra leaders, brought this action for injunctive relief and treble damages, alleging that petitioners in No. 309, an international musicians union and one of its locals, violated §§ 1 and 2 of the Sherman Act. The challenged practices mainly concerned "club-date" engagements where an orchestra through arrangement with the purchaser of the music made by a musician or booking agent plays for a special occasion. The musician making the arrangements assumes the role of "leader," performs himself (or designates a "subleader"), and engages a number of instrumentalists ("sidemen"). Petitioners' practices result from unilaterally adopted union bylaws and regulations whereby petitioners with respect to orchestra leaders: pressure them to become union members; insist upon a closed shop; refuse to bargain collectively; impose minimum employment quotas; require them to use a special ("Form B") contract or (where Local 802 is concerned) to agree to all union regulations and pay minimum wages; require them to favor local musicians by making them pay higher wages to musicians from outside a local's jurisdiction; require them to charge music purchasers minimum prices prescribed in a "Price List Booklet" (which are the total of: the minimum wage scales for sidemen, a "leader's fee" which is double the sideman's scale when four or more musicians compose the orchestra, and an additional 8%; and a subleader with four or more musicians must be paid 1½ times the wage scale out of the leader's fee); prevent them from accepting engagements from or making payments to caterers; and allow them to accept engagements by booking agents only if union-licensed. Respondents contended that petitioners' involvement of the orchestra leaders in these practices created a conspiracy with a "non-labor" group.

*Together with No. 310, *Carroll et al.* v. *American Federation of Musicians of the United States and Canada et al.*, also on certiorari to the same court.

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The District Court dismissed the action on the merits, holding that the challenged practices "come within the definition of the term 'labor dispute' and are exempt from the antitrust laws" under the Norris-LaGuardia Act. The Court of Appeals, though otherwise affirming the dismissal, reversed on the alleged price-fixing issue, holding that the "Price List" was not within the labor exemption and that its establishment of price floors constituted a *per se* violation of the Sherman Act. *Held:* Petitioners' involvement of the orchestra leaders in the promulgation and enforcement of the challenged regulations and bylaws does not create a combination or conspiracy in violation of the Sherman Act but falls within the exemption of the Norris-LaGuardia Act since the orchestra leaders were a "labor" group and parties to a "labor dispute." Pp. 102, 105–114.

(a) The District Court correctly stated the criterion for determining that the orchestra leaders were a "labor" group and parties to a "labor dispute" as the "presence of a job or wage competition or some other economic relationship affecting legitimate union interests between the union members and the independent contractors. If such a relationship existed the independent contractors were a 'labor group' and party to a labor dispute under the Norris-LaGuardia Act." 241 F. Supp., at 887. Pp. 105–106.

(b) The allowable area of union activity under the Norris-LaGuardia Act is not restricted to an immediate employer-employee relation. P. 106.

(c) With respect to petitioners' practices (other than those described in (d) and (e), *infra*), the District Court found that the orchestra leaders performed work and functions actually or potentially affecting the hours, wages, job security, and working conditions of petitioners' members; and these findings, which were substantially supported by the evidence, warranted the conclusion that such practices were lawful. Pp. 106–107.

(d) The "Price List" was lawful since its price floors were expressly designed to and did function as a protection of the wage scales of sidemen and subleaders, who are employees on club-dates, against the job and wage competition of the leaders. *Teamsters Union* v. *Oliver*, 358 U. S. 283. Pp. 107–113.

(e) The caterer and booking agent restrictions, which were as closely connected with the subject of wages as were the price floors, were also lawful. Pp. 113–114.

372 F. 2d 155, vacated and remanded.

Ronald Rosenberg argued the cause for petitioners in No. 309 and respondents in No. 310. With him on the briefs were *Henry Kaiser, Eugene Gressman, George Kaufmann, Jerome H. Adler,* and *David I. Ashe.*

Godfrey P. Schmidt argued the cause and filed briefs for respondents in No. 309 and petitioners in No. 310.

Briefs of *amici curiae* were filed by *J. Albert Woll, Laurence Gold,* and *Thomas E. Harris* for the American Federation of Labor and Congress of Industrial Organizations, and by *Shayle P. Fox* and *Samuel H. Young* for the National Association of Orchestra Leaders.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This action for injunctive relief and treble damages alleging violations of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. §§ 1 and 2, was brought in the District Court for the Southern District of New York against the petitioners in No. 309, American Federation of Musicians and its Local 802.[1] The question is whether union practices of the petitioners affecting orchestra leaders violate the Sherman Act as activities in combination with a "non-labor" group, or are exempted by the Norris-LaGuardia Act as activities affecting a "labor" group which is party to a "labor dispute."[2] After a

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[1] Peterson and Carroll, respondents in No. 309, filed the first action in July 1960 and the other in December 1960. The latter was brought to challenge an increase in the musicians' wage scale adopted after the first complaint was filed. The other respondents were allowed to intervene. By stipulation the testimony in *Carroll* v. *Associated Musicians,* 206 F. Supp. 462, 316 F. 2d 574, and *Cutler* v. *American Federation of Musicians,* 211 F. Supp. 433, 316 F. 2d 546, was made part of the record.

[2] § 13 (c), 47 Stat. 73, 29 U. S. C. § 113 (c); see also §§ 6 and 20 of the Clayton Act, 38 Stat. 731, 738, 15 U. S. C. § 17, 29 U. S. C. § 52.

five-week trial without a jury the District Court dismissed the action on the merits, holding that all of the petitioners' practices brought in question "come within the definition of the term 'labor dispute' . . . and are exempt from the antitrust laws." 241 F. Supp. 865, 894. The Court of Appeals for the Second Circuit reversed on the issue of alleged price fixing, but in all other respects affirmed the dismissal. 372 F. 2d 155. Both parties sought certiorari, in No. 309 the petitioners from the reversal of the dismissal in respect of alleged price fixing, and in No. 310 the respondents from the affirmance of the dismissal in the other respects. We granted both petitions, 389 U. S. 817. We hold that the District Court properly dismissed the action on the merits, and that the Court of Appeals should have affirmed the District Court judgment in its entirety.

I.

The petitioners are labor unions of professional musicians. The union practices questioned here are mainly those applied to "club-date" engagements of union members. These are one-time engagements of orchestras to provide music, usually for only a few hours, at such social events as weddings, fashion shows, commencements, and the like.[3] The purchaser of the music, *e. g.*, the father of the bride, the chairman of the events, etc., makes arrangements with a musician, or with a musician's booking agent, for an orchestra of a conductor and a given number

[3] "Musical engagements are generally classified as either 'steady,' those lasting for longer than one week, or 'single,' usually one day or one performance affairs but including all engagements lasting less than one week. The much sought after steady engagements are rare in comparison with the number of single engagements.

"The predominant form of single engagement is the 'club date'. . . . Single engagements also include the 'non-club date' field, consisting of television appearances or recording engagements, etc. . . ." 372 F. 2d, at 158.

of instrumentalists, or "sidemen," at a specified time and place. The musician in such cases assumes the role of "leader" of the orchestra, obtains the "sidemen" and attends to the bookkeeping and other details of the engagement. Usually the "leader" performs with the orchestra, sometimes only conducting but often also playing an instrument. When he does not personally appear, he designates a "subleader" who conducts for him and often also plays an instrument.

A musician performing "club-dates" may perform in different capacities on the same day or during the same week, at times as leader and other times as subleader or sideman. The four respondents, however, are musicians who usually act as leaders and maintain offices and employ personnel to solicit engagements through advertising and personal contacts. When two or more engagements are accepted for the same time, each of the respondents will conduct, and, except respondent Peterson, sometimes play, at one and designate a subleader to perform the functions of leader at the other.[4]

The four respondents were members of the petitioner Federation and Local 802 when this suit was filed.[5] Virtually all musicians in the United States and the great

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[4] Both the District Court and the Court of Appeals held that respondents did not prove that they properly represented a class under former Fed. Rule Civ. Proc. 23 (a), 241 F. Supp., at 884–886; 372 F. 2d, at 161–163. The record sustains this conclusion. *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U. S. 356; *Hansberry* v. *Lee*, 311 U. S. 32. Since all of the respondents either play an instrument or conduct their orchestras unless they book more than one engagement for the same time, we do not have before us a leader who merely books engagements and never appears with his orchestra.

[5] Carroll and Peterson have since been expelled from membership. See 241 F. Supp., at 870. Both are still permitted to book engagements and hire musicians to play at them but cannot appear with their orchestra either as conductors or instrumentalists. See *Carroll* v. *American Federation of Musicians*, 310 F. 2d 325.

majority of the orchestra leaders are union members. There are no collective bargaining agreements in the club-date field.[6] Club-date engagements are rigidly regulated by unilaterally adopted union bylaws and regulations. Under these bylaws and regulations

(1) Petitioners enforce a closed shop and exert various pressures upon orchestra leaders to become union members.

(2) Orchestra leaders must engage a minimum number of sidemen for club-date engagements.

(3) Orchestra leaders must charge purchasers of music minimum prices prescribed in a "Price List Booklet." The prices are the total of (a) the minimum wage scales for sidemen, (b) a "leader's fee" which is double the sideman's scale when four or more musicians compose the orchestra, and (c) an additional 8% to cover social security, unemployment insurance, and other expenses. When the leader does not personally appear at an engagement, but designates a subleader and four or more musicians perform, the leader must pay the subleader one and one-half times the wage scale out of his "leader's fee."

(4) Orchestra leaders are required to use a form of contract, called the Form B contract, for all engagements. In the club-date field, however, Local 802 accepts assurances that the terms of club-date engagements comply with all union regulations and provide for payment of the minimum wage. Union business agents police compliance.

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[6] "The distinction between the kinds of single engagements is vital; the non-club date engagements are ordinarily governed by collective bargaining agreements . . . . The same is usually true of the steady engagement field. Local 802 has collective bargaining agreements with the major users or 'purchasers' of live music within its area such as recording companies, hotels, television and film producers, opera companies and theatres." 372 F. 2d, at 158.

(5) Additional regulations apply to traveling engagements. The leader of a traveling orchestra must charge 10% more than the minimum price of either the home local or of the local in whose territory the orchestra is playing, whichever is greater.

(6) Orchestra leaders are prohibited from accepting engagements from or making any payments to caterers.

(7) Orchestra leaders may accept engagements made by booking agents only if the booking agents have been licensed by the unions under standard forms of license agreements provided by the unions.

The District Court assumed, and the Court of Appeals held, that orchestra leaders in the club-date field are employers and independent contractors.[7] Respondents argue that petitioners' involvement of the orchestra leaders in the promulgation and enforcement of the challenged regulations and bylaws creates a combination or conspiracy with a "non-labor" group which violates the Sherman Act. *Allen Bradley Co.* v. *Union,* 325 U. S. 797, 800; *Los Angeles Meat & Provision Drivers Union* v. *United States,* 371 U. S. 94; *Mine Workers* v. *Pennington,* 381 U. S. 657. But the Court of Appeals concurred in the finding of the District Court that such orchestra leaders, although deemed to be employers and independent contractors, constitute not a "non-labor" group but a "labor" group. 372 F. 2d, at 168.[8]

The criterion applied by the District Court in determining that the orchestra leaders were a "labor" group

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[7] See 241 F. Supp., at 887; 372 F. 2d, at 159. We need not decide the question.

[8] The Court of Appeals also found "no evidence of a conspiracy between Local 802, or the Federation, and orchestra leaders to eliminate competitors, fix prices or achieve any other commercial restraint, nor was such a finding made by the district judge. Rather, the record establishes that all restraints were instituted unilaterally by the unions and acquiesced in by the orchestra leaders." 372 F. 2d, at 164; see 241 F. Supp., at 891.

and parties to a "labor dispute" was the "presence of a job or wage competition or some other economic interrelationship affecting legitimate union interests between the union members and the independent contractors. If such a relationship existed the independent contractors were a 'labor group' and party to a labor dispute under the Norris-LaGuardia Act." 241 F. Supp., at 887. The Court of Appeals held, and we agree, that this is a correct statement of the applicable principles. The Norris-LaGuardia Act took all "labor disputes" as therein defined outside the reach of the Sherman Act and established that the allowable area of union activity was not to be restricted to an immediate employer-employee relation. *United States* v. *Hutcheson,* 312 U. S. 219, 229–236; *Allen Bradley Co.* v. *Union, supra,* at 805–806; *Los Angeles Meat & Provision Drivers Union* v. *United States, supra,* at 103; *Milk Wagon Drivers' Union* v. *Lake Valley Farm Prods.,* 311 U. S. 91. "This Court has recognized that a legitimate aim of any national labor organization is to obtain uniformity of labor standards and that a consequence of such union activity may be to eliminate competition based on differences in such standards." *Mine Workers* v. *Pennington,* 381 U. S. 657, 666.

The District Court found that the orchestra leaders performed work and functions which actually or potentially affected the hours, wages, job security, and working conditions of petitioners' members.[9] These findings have substantial support in the evidence and in the light of the job and wage competition thus established, both courts correctly held that it was lawful for petitioners to pressure the orchestra leaders to become union mem-

[9] "[I]n the club date and hotel steady engagement fields . . . orchestra leaders are in competition with employee members of the . . . unions regarding jobs, wages and other working conditions. As a result, they comprise a labor group in these fields." 241 F. Supp., at 887–888.

bers, *Los Angeles Meat Drivers, supra,* and *Milk Wagon Drivers', supra,* to insist upon a closed shop, *United States* v. *American Federation of Musicians,* 318 U. S. 741, affirming 47 F. Supp. 304, to refuse to bargain collectively with the leaders, see *Hunt* v. *Crumboch,* 325 U. S. 821, to impose the minimum employment quotas complained of, *United States* v. *American Federation of Musicians, supra,* to require the orchestra leaders to use the Form B contract, see *Teamsters Union* v. *Oliver,* 362 U. S. 605 (*Oliver II*), and to favor local musicians by requiring that higher wages be paid to musicians from outside a local's jurisdiction, *Rambusch Decorating Co.* v. *Brotherhood of Painters,* 105 F. 2d 134.

The District Court also sustained the legality of the "Price List" stating, "In view of the competition between leaders and sidemen and subleaders which underlies the finding that the leaders are a labor group, the union has a legitimate interest in fixing minimum fees for a participating leader and minimum engagement prices equal to the total minimum wages of the sidemen and the participating leader." 241 F. Supp., at 890. The Court of Appeals, one judge dissenting, disagreed that the "Price List" was within the labor exemption, stating that "the unions' establishment of price floors on orchestral engagements constitutes a per se violation of the Sherman Act." 372 F. 2d, at 165. The premise of the majority's conclusion was that the "Price List" was disqualified for the exemption because its concern is "prices" and not "wages." But this overlooks the necessity of inquiry beyond the form. MR. JUSTICE WHITE'S opinion in *Meat Cutters* v. *Jewel Tea,* 381 U. S. 676, 690, n. 5, emphasized that "[t]he crucial determinant is not the form of the agreement—*e. g.,* prices or wages—but its relative impact on the product market and the interests of union members." It is therefore not dispositive of the question that petitioners' regulation in form establishes price floors.

The critical inquiry is whether the price floors in actuality operate to protect the wages of the subleader and sidemen. The District Court found that the price floors were expressly designed to and did function as a protection of sidemen's and subleaders' wage scales against the job and wage competition of the leaders. The Court said:

> "As a consequence of this relationship, the practices of [orchestra leaders] when they lead and play must have a vital effect on the working conditions of the non-leader members of the union. If they undercut the union wage scale or do not adhere to union regulations regarding hours or other working conditions when they perform they will undermine these union standards. They would put pressure on the union members they compete with to correspondingly lower their own demands." 241 F. Supp., at 888.

The Court of Appeals itself expressed a similar view in saying:

> "even those orchestra leaders who, as employers in club dates, lead but never perform as players, are proper subjects for membership because they are in job competition with union sub-leaders; each time a non-union orchestra leader performs, he displaces a 'union job' with a 'non-union job.'" 372 F. 2d, at 168.

And of particular significance, the Court of Appeals noted that where the leader performs

> "the services of a sub-leader would not be required and the leader may in this way save the wages he would otherwise have to pay. Consequently, he could make the services of his orchestra available at a lower price than could a non-performing leader." 372 F. 2d, at 166.

Thus the price floors, including the minimums for leaders, are simply a means for coping with the job and wage competition of the leaders to protect the wage scales of musicians who respondents concede are employees on club-dates, namely sidemen and subleaders. As such the provisions of the "Price List" establishing those floors are indistinguishable in their effect from the collective bargaining provisions in *Teamsters Union* v. *Oliver,* 358 U. S. 283 (*Oliver I*), which we held governed not prices but the mandatory bargaining subject of wages. The precise issue in *Oliver I* was whether Article XXXII of a multi-employer, multistate collective bargaining agreement between the Teamsters Union and a bargaining organization of motor carriers dealt with a mandatory subject of bargaining. Article XXXII provided that drivers who own and drive their own vehicles should be paid, in addition to the prescribed driver's wage, not less than a prescribed minimum rental for the use of their vehicles. We held that the article was a wage and not a price provision, saying:

> "The inadequacy of a rental which means that the owner makes up his excess costs from his driver's wages not only clearly bears a close relation to labor's efforts to improve working conditions but is in fact of vital concern to the carrier's employed drivers; an inadequate rental might mean the progressive curtailment of jobs through withdrawal of more and more carrier-owned vehicles from service. . . ." 358 U. S., at 294.

We disagree with the Court of Appeals that "[t]he circumstances constituting a possible threat to the employment of sub-leaders or the displacement of a sideman . . . are not at all comparable," 372 F. 2d, at 166. The price floors here serve the identical ends served by Article XXXII in *Oliver I*. The Price List has in common with

Article XXXII the objective to protect employees' job opportunities and wages from job and wage competition of other union members—in the case of the Article, drivers when they drive their own vehicles, and in the case of the Price List, musicians on the occasions they are leaders and play a role as employers. Like the Article, the Price List is therefore "a direct and frontal attack upon a problem thought to threaten the maintenance of the basic wage structure . . . ." 358 U. S., at 294.[10]

The majority of the Court of Appeals apparently regarded *Meat Cutters* v. *Jewel Tea, supra,* as militating against this conclusion. The majority read the opinions of MR. JUSTICE WHITE and Mr. Justice Goldberg in that case as requiring a holding that "mandatory subjects of collective bargaining carry with them an exemption . . . ," but that "[o]n matters outside of the mandatory area . . . no such considerations govern . . . ." 372 F. 2d, at 165. Even if only mandatory subjects of bargaining enjoy the exemption—a question not in this case and upon which we express no view—nothing MR. JUSTICE WHITE or Mr. Justice Goldberg said remotely suggests that the distinction between mandatory and nonmandatory subjects turns on the form of the method taken to protect a wage scale, here a price floor. To the

[10] The "Price List" establishes only a minimum charge; there is no attempt to set a maximum. Nor does the union attempt by its minimum charge to assure the leader a profit above the fair value of his labor services. The District Court found no evidence "which indicates that the increment to the [leader] is unrelated to his costs in that function." 241 F. Supp., at 891. See also 372 F. 2d, at 170 (Friendly, J., in separate opinion): "A different result might be warranted if the floor were set so high as to cover not merely compensation for the additional services rendered by a leader but entrepreneurial profit as well. But there has been no such showing here."

contrary, we pointed out above that MR. JUSTICE WHITE's opinion emphasized that the "crucial determinant is not the form of the agreement . . ." and cited *Oliver I* as settling that proposition. 381 U. S., at 690, n. 5.

The reasons which entitle the Price List to the exemption embrace the provision fixing the minimum price for a club-date engagement when the orchestra leader does not perform, and does not displace an employee-musician.[11] That regulation is also justified as a means of preserving the scale of the sidemen and subleaders. There was evidence that when the leader does not collect from the purchaser of the music an amount sufficient to make up the total of his out-of-pocket expenses, including the sum of his wage-scale wages and the scale wages of the sidemen,[12] he will, in fact, not pay the sidemen the prescribed scale. The District Court found:

> "It is unquestionably true that skimping on the part of the person who sets up the engagement [the leader] so that his costs are not covered is likely to have an adverse effect on the fees paid to the participating musicians. By fixing a reasonable amount over the sum of the minimum wages of the musicians participating in an engagement to cover these

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[11] Because of the intense competition for positions as leader, the full-time leader "displaces" another union member simply by securing an engagement for himself. Union members who act principally as sidemen and subleaders but who act occasionally as leaders "bid for the same jobs as full-time leaders such as plaintiffs and perform the same musical service when they get a job. They also perform in the same places as full-time leaders." 241 F. Supp., at 872.

[12] Only two things can happen when the leader does not charge the specified minimum; either he works below union scale or the musicians he employs work below union scale. In either event the result is price competition through differences of standards in the labor market.

> expenses, the union insures that 'no part of the labor costs paid to a [leader] would be diverted by him for overhead or other non-labor costs.'" 241 F. Supp., at 891.

In other words, the price of the product—here the price for an orchestra for a club-date—represents almost entirely the scale wages of the sidemen and the leader. Unlike most industries, except for the 8% charge, there are no other costs contributing to the price. Therefore, if leaders cut prices, inevitably wages must be cut.

The analyses of MR. JUSTICE WHITE and Mr. Justice Goldberg in *Jewel Tea* support our conclusion. *Jewel Tea* did not hold that an agreement respecting marketing hours would always come within the labor exemption. Rather, that case held that such an agreement was lawful because it was found that the marketing-hours restriction had a substantial effect on hours worked by the union members. Similarly, the price-list requirement is brought within the labor exemption under the finding that the requirement is necessary to assure that scale wages will be paid to the sidemen and the leader. If the union may not require that the full-time leader charge the purchaser of the music an amount sufficient to compensate him for the time he spends selecting musicians and performing the other musical functions involved in leading, the full-time leader may compete with other union members who seek the same jobs through price differentiation in the product market based on differences in a labor standard. His situation is identical to that of a truck owner in *Oliver I* who does not charge an amount sufficient to compensate him for the value of his labor services in driving the truck, and is a situation which the union can prevent consistent with its antitrust exemption. There can be no differentiation between the leader who appears with his orchestra and

the one who on occasion hires a subleader. In either case part of the union-prescribed "leader's fee" is attributable to service rendered in either conducting or playing and part to the service rendered in selecting musicians, bookkeeping, etc. The only difference is that in the former situation the leader keeps the entire fee while in the latter he is required to pay that part of it attributable to playing or conducting to the subleader. In this respect we agree with the view espoused by Judge Friendly in his separate opinion, 372 F. 2d, at 168–170.

We think also that the caterer and booking agent restrictions "are at least as intimately bound up with the subject of wages," *Oliver II*, *supra*, at 606, as the price floors. The District Court found that the booking agent regulations were adopted because of experience that "many booking agents charged exorbitant fees to members and booked engagements for musicians at wages which were below union scale." 241 F. Supp., at 881–882. On the basis of these findings, the District Court concluded:

> "Because the activities of the booking agents here have and had a direct and substantial effect on the wages of the members of [the unions], I find that they are in an economic interrelationship with the members . . . such that the [unions] are justified in regulating their activities . . . . Furthermore, I find the regulations to be reasonably related to their interest in maintaining observance of union scale wages and working conditions." 241 F. Supp., at 893.

The finding concerning the caterer regulations was to the same effect.

> "The evidence discloses that caterers took advantage of their position before the union adopted its regulations to, in effect, book orchestras and they

continue to do so, at least to some extent. Caterers recommend orchestras to customers and receive commissions from orchestra leaders. These practices actually or potentially affect the wages of the musicians involved.

"I believe that this constitutes an economic interrelationship which permits the defendants to regulate and prohibit the booking activities of the caterers without violating the Sherman Act." 241 F. Supp., at 893.

The judgment of the Court of Appeals is vacated and the cases are remanded with direction to enter a judgment affirming the judgment of the District Court in its entirety.

It is so ordered.

THE CHIEF JUSTICE and MR. JUSTICE MARSHALL took no part in the consideration or decision of these cases.

MR. JUSTICE WHITE, with whom MR. JUSTICE BLACK joins, dissenting.

In my view the Court is misled by the peculiar role of bandleaders and the peculiar economics of the club-date music industry, and fashions a rule which, if comprehensible at all, has unfortunate consequences for the delicate and difficult area of conflict between antitrust and labor policy.

The four respondents in No. 309 (hereafter respondents) are successful bandleaders whose success has made it unnecessary for them to continue working from time to time as sidemen and subleaders. However they do work as leaders.[1] Indeed, their business practice was to lead

[1] Rather, they worked as leaders until their insubordination resulted in expulsion from the union. See 241 F. Supp. 865, 870 (D. C. S. D. N. Y. 1965).

individually whenever they obtained an engagement, hiring a subleader only when they obtained two or more engagements at conflicting times. Leading a band was obviously one important part of their working careers; it was not, however, the only part. Respondents also devoted much time and energy to organizing and managing their businesses. They advertised, and in other ways obtained engagements. They planned the music to be provided at those engagements. They chose, recruited, and supervised the subleaders and sidemen working for them. And they established and directed the administrative operation necessary for obtaining and fulfilling engagements.

The Court accepts the finding that respondents were a "labor" group. I would think it beyond dispute that leading a band (a task which usually includes also occasional playing of an instrument) is "labor group work," but that it is equally beyond dispute that managing and administering a business whose function is supplying bands to fathers of brides is not "labor group work." [2] The first task, leading, certainly possesses "economic interrelationship[s] affecting legitimate union interests," [3] and the second clearly does not. The Court appears to feel that because respondents' work includes some "labor group" tasks, all aspects of respondents' activities are proper subjects of union concern. I see no reason why the law in this area cannot be sufficiently flexible to grant the union antitrust immunity for regulation of those activities of bandleaders which sufficiently affect union members, while denying that immunity where the union has no proper concern.

Teamsters Union v. *Oliver*, 358 U. S. 283 (1959), is a difficult case, but an important one, with which I fully

[2] See *Columbia River Packers Assn.* v. *Hinton*, 315 U. S. 143 (1942).

[3] 241 F. Supp., at 887.

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agree.[4] *Oliver*, as I read it, holds that where independent contractors are doing work for an employer in competition with the work of union members, the union can bargain with the employer to make certain they are not doing that work at a lower wage than that paid to members.[5] Since in *Oliver* an independent truck driver who claimed to be charging the union rate for his labor but received in addition less than his costs for equipment and gasoline would in fact be cutting the union wage scale, the Court held that the union did not violate the antitrust laws when it bargained about the total amount—including both wage and equipment costs—that the companies would pay to the independent owner-drivers. On the facts before us, *Oliver* is relevant, but not across-the-board, as the Court seems to think. Here, when one of respondents leads, he does work—playing and leading—which is also done by union members, and for which the union has a proper concern. The union thus has a right to see that the respondent does not perform that work for less than the going scale for union musicians and subleaders. Since the leader fixes a single charge to compensate him for both leading and organizing, the union can require the leader to make that charge not less than the union scale for a subleader plus the leader's costs in obtaining the engagement, hiring the musicians, and planning the program. Since, as Judge Friendly said in his separate opinion below, the price the union requires leaders to charge has not been shown to be "set so high as to cover not merely compensation for the additional services rendered by a leader

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[4] See *Meat Cutters* v. *Jewel Tea Co.*, 381 U. S. 676, 690, n. 5 (1965).

[5] The union could have bargained for restrictions on contracting out of work by the employer. *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U. S. 203 (1964).

but entrepreneurial profit as well," [6] the union should be free of antitrust liability for imposing this minimum rate on charges by leaders when they actually lead. *Oliver* so holds.

The question is quite different, however, when we deal with imposition of fixed minimum charges by leaders for engagements at which they do not themselves lead. For such engagements the role of the leader is solely that of entrepreneur: he obtains a customer (partly, it appears, through the attraction of his reputation as an established provider of music), makes the necessary arrangements for servicing the customer, including employment and supervision of staff, and maintains the administrative structure required for this work: office, payroll clerk, permanent telephone listing, and so forth. The union has of course a full right to impose on this leader, who is in effect an employer, its minimum scale for work by sidemen and subleaders. The musicians union, however, goes further. It requires that, for an engagement of four or more musicians, the leader charge his customer not less than the sideman's scale times the number of musicians (including the subleader), plus double the sideman's scale to compensate the leader, of which one-fourth—plus the sideman's scale—goes to the subleader. The union is clearly requiring that the leader charge his customer more than the total of the leader's wage bill, even though the leader himself does no "labor group" work.

There is no clear holding by this Court that a union is not immune from antitrust liability when it requires that all the employers with whom it deals charge uniform prices. It has certainly been assumed, however, that the Norris-LaGuardia exemption to the antitrust laws does not extend this far. In *Meat Cutters* v. *Jewel Tea*

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[6] 372 F. 2d 155, 170 (C. A. 2d Cir. 1967).

Co., 381 U. S. 676 (1965), the entire Court joined opinions strongly suggesting there is no antitrust immunity for a union which joins with employers to fix the prices at which the employers sell to the public. I wrote, in an opinion joined by THE CHIEF JUSTICE and MR. JUSTICE BRENNAN:

> "Jewel, for example, need not have bargained about or agreed to a schedule of prices at which its meat would be sold and the unions could not legally have insisted that it do so. But if the unions had made such a demand, Jewel had agreed and the United States or an injured party had challenged the agreement under the antitrust laws, we seriously doubt that either the unions or Jewel could claim immunity by reason of the labor exemption, whatever substantive questions of violation there might be." 381 U. S., at 689.

Mr. Justice Goldberg in his separate opinion, joined by JUSTICES HARLAN and STEWART, wrote:

> "The direct and overriding interest of unions in such subjects as wages, hours, and other working conditions, which Congress has recognized in making them subjects of mandatory bargaining, is clearly lacking where the subject of the agreement is price-fixing and market allocation. Moreover, such activities are at the core of the type of anticompetitive commercial restraint at which the antitrust laws are directed." 381 U. S., at 732–733.

MR. JUSTICE DOUGLAS, dissenting in *Jewel Tea* and joined by JUSTICES BLACK and Clark, wrote:

> "[T]he unions can no more aid a group of businessmen to force their competitors to follow uniform store marketing hours than to force them to sell at

> fixed prices. Both practices take away the freedom of traders to carry on their business in their own competitive fashion." 381 U. S., at 737.[7]

Unions are, of course, not without interest in the prices at which employers sell. As the majority points out, by seeing that employers sell at prices covering all their costs, a union can insure employer solvency and make more certain employee collection of wages owed them. In addition, assuring that competing employers charge at least a minimum price prevents price competition from exerting downward pressure on wages. On the other hand, price competition, a significant aid to satisfactory resource allocation and a deterrent to inflation, would be substantially diminished if industry-wide unions were free to dictate uniform prices through agreements with employers.[8] I have always thought that this strong policy outweighed the legitimate union interest in the prices at which employers sell, and until today I had thought that the Court agreed. Of course the lack of discussion of this question in the majority's opinion, and the failure to refer to the unanimous rejec-

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[7] As one commentator has concluded, "Although the Court split on the application of this proposition, all the justices agreed that the antitrust laws would be offended by a collective bargaining agreement binding employers to charge a certain price for their goods." P. Areeda, Antitrust Analysis 52 (1967). See also *Mine Workers* v. *Pennington*, 381 U. S. 657, 663 (1965): "If the UMW in this case, in order to protect its wage scale by maintaining employer income, had presented a set of prices at which the mine operators would be required to sell their coal, the union and the employers who happened to agree could not successfully defend this contract provision if it were challenged under the antitrust laws by the United States or by some party injured by the arrangement."

[8] See J. T. Dunlop, Wage Determination Under Trade Unions (1950); C. E. Lindblom, Unions and Capitalism (1949); E. S. Mason, Economic Concentration and the Monopoly Problem (1957).

tion in *Jewel Tea* of antitrust immunity for union efforts to fix industry-wide prices, suggest that the Court takes this step without full awareness of the implications and the likely consequences. The step is nonetheless disturbing, and I must record my dissent.

I am also in disagreement with the majority about certain of the questions presented in No. 310. The musicians union imposes its rules not only on respondents, who sometimes lead and sometimes hire subleaders, but upon leaders who never lead personally. These leaders are merely independent businessmen, performing no "labor group" work, and the union has no proper interest in regulating their activities. Even though the District Court found that the union imposed its rules on these leaders, I believe the facts as found below demonstrate that the union formed a combination with those independent businessmen.[9] If the union and employers combined, I have no doubt that some of the regulations agreed upon were unlawful restraints of trade. Boycotting booking agents and caterers who occasionally did business with employers not living by the union's rules unreasonably restrained trade. So also did combining with willing caterers and booking agents to impose uniform business practices on bandleaders and to boycott those who did not abide by the established rules and policies. Agreeing with employers that the employers would not take their wares to other cities without charging prices 10% higher than the local employers charged was a

[9] *United States* v. *Parke, Davis & Co.*, 362 U. S. 29 (1960). See also *Albrecht* v. *Herald Co.*, 390 U. S. 145, 150, n. 6 (1968). I cannot believe that the Court intends its n. 8 to hold that unilateral demands, enforced by threats, combined with willing cooperation or reluctant acquiescence by leaders (who may join the union and in any event obey its rules), cannot amount to a combination in restraint of trade.

blatant violation of the Sherman Act. Horizontal division of territories has always been held a *per se* violation of § 1, *e. g., Addyston Pipe & Steel Co.* v. *United States,* 175 U. S. 211 (1899), and it should make no difference that the instigation for this division came from the union and not from the employers. I am unable to see how the practice at issue here is distinguishable from an agreement by General Motors and Ford, at the behest of the UAW, for GM to sell west of the Mississippi only at prices 10% higher than those charged by Ford, while Ford would sell in the East only at prices higher than GM's. Since union combinations with nonlabor groups which restrain trade are not immune from antitrust attack, *Allen Bradley Co.* v. *Union,* 325 U. S. 797 (1945); *Mine Workers* v. *Pennington,* 381 U. S. 657 (1965), I think respondents should be permitted to show that these unlawful and unimmunized restraints of trade injured them, and should be able to recover the trebled amount of such damages as they can establish.

By combining with a nonlabor group, the musicians union has obtained effective control of the entire club-date industry. The device for this control has been imposition of union membership and union rules on cooperating bandleaders, and on some who did not want to cooperate. I am sure the Clayton and Norris-LaGuardia Acts never intended to give unions this kind of stranglehold on any industry. It may be that the Court views this industry as having special problems of supply and demand requiring special treatment under the antitrust laws. If this is the case, the Court should frankly say so and seek to confine the misguided rules of law it announces. More appropriately, the Court should leave to Congress the task of making special provisions in the antitrust laws for the special circumstances of the music industry. On more than one occasion Con-

gress has seen to it that the full rigors of the antitrust laws are not felt by industries which cannot survive under competitive conditions.[10] The Court treads dangerous ground in seeking on its own motion to deny to a particular industry the normal competitive conditions envisioned by the antitrust laws, conditions usually viewed as essential for maintaining service and prices at satisfactory levels.

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[10] *E. g.*, § 1 of the the Capper-Volstead Act, 42 Stat. 388, 7 U. S. C. § 291 (agricultural cooperatives); § 2 of the Webb-Pomerene Act, 40 Stat. 517, 15 U. S. C. § 62 (foreign trade associations); § 6 (b) (1) of the Act of Nov. 8, 1966, 80 Stat. 1515, 15 U. S. C. § 1291 (1964 ed., Supp. II) (joint agreements by professional football clubs).

BRUTON *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 705. Argued March 11, 1968.—Decided May 20, 1968.

A joint trial of petitioner and one Evans resulted in the convictions of both for armed postal robbery. Evans did not take the stand but a postal inspector testified that Evans confessed orally that he and petitioner committed the robbery. The trial judge instructed the jury that although Evans' confession was competent evidence against him it was inadmissible hearsay against petitioner and had to be disregarded in determining petitioner's guilt or innocence. Evans and petitioner both appealed to the Court of Appeals. That court set aside Evans' conviction on the ground that the oral confession should not have been received against him but affirmed petitioner's conviction in view of the trial judge's instructions, relying on *Delli Paoli* v. *United States*, 352 U. S. 232. *Held:* Because of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining petitioner's guilt, admission of Evans' confession in the joint trial violated petitioner's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment. *Delli Paoli* v. *United States, supra*, overruled. Pp. 126–137.

375 F. 2d 355, reversed.

Daniel P. Reardon, Jr., argued the cause and filed a brief for petitioner.

Solicitor General Griswold argued the cause for the United States. With him on the brief were *Assistant Attorney General Vinson, Robert S. Rifkind*, and *Beatrice Rosenberg*.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This case presents the question, last considered in *Delli Paoli* v. *United States*, 352 U. S. 232, whether the conviction of a defendant at a joint trial should be set aside

although the jury was instructed that a codefendant's confession inculpating the defendant had to be disregarded in determining his guilt or innocence.

A joint trial of petitioner and one Evans in the District Court for the Eastern District of Missouri resulted in the conviction of both by a jury on a federal charge of armed postal robbery, 18 U. S. C. § 2114. A postal inspector testified that Evans orally confessed to him that Evans and petitioner committed the armed robbery. The postal inspector obtained the oral confession, and another in which Evans admitted he had an accomplice whom he would not name, in the course of two interrogations of Evans at the city jail in St. Louis, Missouri, where Evans was held in custody on state criminal charges. Both petitioner and Evans appealed their convictions to the Court of Appeals for the Eighth Circuit. That court set aside Evans' conviction on the ground that his oral confessions to the postal inspector should not have been received in evidence against him. 375 F. 2d 355, 361.[1] However, the court, relying upon *Delli*

[1] The trial began June 20, 1966, one week after the decision in *Miranda* v. *Arizona*, 384 U. S. 436. The Court of Appeals held, 375 F. 2d, at 357, that *Miranda* and its companion cases were therefore applicable and controlling on the question of the admissibility in evidence of the postal inspector's testimony as to Evans' admissions. *Johnson* v. *New Jersey*, 384 U. S. 719. On April 8, 1966, St. Louis police officers, without giving Evans preliminary warnings of any kind and in the absence of counsel, obtained an oral confession during an interrogation at the city jail. The police informed the postal inspector, who interrogated Evans at the jail on April 11 and May 4, 1966; he obtained the oral confession expressly implicating petitioner on the latter date. On the merits, the Court of Appeals held, 375 F. 2d, at 361, that Evans' admissions to the postal inspector "were tainted and infected by the poison of the prior, concededly unconstitutional confession obtained by the local officer," and were therefore inadmissible under *Westover* v. *United States*, decided with *Miranda*, 384 U. S., at 494–497. On the retrial, Evans was acquitted.

Paoli, affirmed petitioner's conviction because the trial judge instructed the jury that although Evans' confession was competent evidence against Evans it was inadmissible hearsay against petitioner and therefore had to be disregarded in determining petitioner's guilt or innocence. 375 F. 2d, at 361–363.[2] We granted certiorari to reconsider *Delli Paoli*. 389 U. S. 818. The Solicitor General has since submitted a memorandum stating that "in the light of the record in this particular case and in the interests of justice, the judgment below should be reversed and the cause remanded for a new trial." The Solicitor General states that this disposition is urged in part because "[h]ere it has been determined that the confession was wrongly admitted against [Evans] and his conviction has been reversed, leading to a new trial at which he was

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[2] At the close of the Government's direct case, the trial judge cautioned the jury that Evans' admission implicating petitioner "if used, can only be used against the defendant Evans. It is hearsay insofar as the defendant George William Bruton is concerned, and you are not to consider it in any respect to the defendant Bruton, because insofar as he is concerned it is hearsay."

The instructions to the jury included the following:

"A confession made outside of court by one defendant may not be considered as evidence against the other defendant, who was not present and in no way a party to the confession. Therefore, if you find that a confession was in fact voluntarily and intentionally made by the defendant Evans, you should consider it as evidence in the case against Evans, but you must not consider it, and should disregard it, in considering the evidence in the case against the defendant Bruton.

. . . . .

"It is your duty to give separate, personal consideration to the cause of each individual defendant. When you do so, you should analyze what the evidence shows with respect to that individual, leaving out of consideration entirely any evidence admitted solely against some other defendant. Each defendant is entitled to have his case determined from his own acts and statements and the other evidence in the case which may be applicable to him."

acquitted. To argue, in this situation, that [petitioner's] conviction should nevertheless stand may be to place too great a strain upon the [*Delli Paoli*] rule—at least, where, as here, the other evidence against [petitioner] is not strong." We have concluded, however, that *Delli Paoli* should be overruled. We hold that, because of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining petitioner's guilt, admission of Evans' confession in this joint trial violated petitioner's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment. We therefore overrule *Delli Paoli* and reverse.

The basic premise of *Delli Paoli* was that it is "reasonably possible for the jury to follow" sufficiently clear instructions to disregard the confessor's extrajudicial statement that his codefendant participated with him in committing the crime. 352 U. S., at 239. If it were true that the jury disregarded the reference to the codefendant, no question would arise under the Confrontation Clause, because by hypothesis the case is treated as if the confessor made no statement inculpating the nonconfessor. But since *Delli Paoli* was decided this Court has effectively repudiated its basic premise. Before discussing this, we pause to observe that in *Pointer* v. *Texas*, 380 U. S. 400, we confirmed "that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him" secured by the Sixth Amendment, *id.*, at 404; "a major reason underlying the constitutional confrontation rule is to give a defendant charged with crime an opportunity to cross-examine the witnesses against him." *Id.*, at 406–407.

We applied *Pointer* in *Douglas* v. *Alabama*, 380 U. S. 415, in circumstances analogous to those in the present case. There two persons, Loyd and Douglas, accused

of assault with intent to murder, were tried separately. Loyd was tried first and found guilty. At Douglas' trial the State called Loyd as a witness against him. An appeal was pending from Loyd's conviction and Loyd invoked the privilege against self-incrimination and refused to answer any questions. The prosecution was permitted to treat Loyd as a hostile witness. Under the guise of refreshing Loyd's recollection the prosecutor questioned Loyd by asking him to confirm or deny statements read by the prosecutor from a document purported to be Loyd's confession. These statements inculpated Douglas in the crime. We held that Douglas' inability to cross-examine Loyd denied Douglas "the right of cross-examination secured by the Confrontation Clause." 380 U. S., at 419. We noted that "effective confrontation of Loyd was possible only if Loyd affirmed the statement as his. However, Loyd did not do so, but relied on his privilege to refuse to answer." *Id.*, at 420. The risk of prejudice in petitioner's case was even more serious than in *Douglas*. In *Douglas* we said, "Although the Solicitor's reading of Loyd's alleged statement, and Loyd's refusals to answer, were not technically testimony, the Solicitor's reading may well have been the equivalent in the jury's mind of testimony that Loyd in fact made the statement; and Loyd's reliance upon the privilege created a situation in which the jury might improperly infer both that the statement had been made and that it was true." *Id.*, at 419. Here Evans' oral confessions were in fact testified to, and were therefore actually in evidence. That testimony was legitimate evidence against Evans and to that extent was properly before the jury during its deliberations. Even greater, then, was the likelihood that the jury would believe Evans made the statements and that they were true—not just the self-incriminating portions but those implicating petitioner as well. Plainly, the introduction of

Evans' confession added substantial, perhaps even critical, weight to the Government's case in a form not subject to cross-examination, since Evans did not take the stand. Petitioner thus was denied his constitutional right of confrontation.

Delli Paoli assumed that this encroachment on the right to confrontation could be avoided by the instruction to the jury to disregard the inadmissible hearsay evidence.[3] But, as we have said, that assumption has since been effectively repudiated. True, the repudiation was not in the context of the admission of a confession inculpating a codefendant but in the context of a New York rule which submitted to the jury the question of the voluntariness of the confession itself. *Jackson* v. *Denno*, 378 U. S. 368. Nonetheless the message of *Jackson* for *Delli Paoli* was clear. We there held that a defendant is constitutionally entitled at least to have the trial judge first determine whether a confession was made volun-

[3] We emphasize that the hearsay statement inculpating petitioner was clearly inadmissible against him under traditional rules of evidence, see *Krulewitch* v. *United States*, 336 U. S. 440; *Fiswick* v. *United States*, 329 U. S. 211, the problem arising only because the statement was (but for the violation of *Westover*, *supra*, n. 1) admissible against the declarant Evans. See C. McCormick, Evidence § 239 (1954); 4 J. Wigmore, Evidence §§ 1048–1049 (3d ed. 1940); Morgan, Admissions as an Exception to the Hearsay Rule, 30 Yale L. J. 355 (1921). See generally Levie, Hearsay and Conspiracy, 52 Mich. L. Rev. 1159 (1954); Comment, Post-Conspiracy Admissions in Joint Prosecutions, 24 U. Chi. L. Rev. 710 (1957); Note, Criminal Conspiracy, 72 Harv. L. Rev. 920, 984–990 (1959). There is not before us, therefore, any recognized exception to the hearsay rule insofar as petitioner is concerned and we intimate no view whatever that such exceptions necessarily raise questions under the Confrontation Clause. See *Pointer* v. *Texas*, 380 U. S. 400; *Barber* v. *Page*, 390 U. S. 719; *Mattox* v. *United States*, 156 U. S. 237. See generally McCormick, *supra*, § 224; 5 Wigmore, *supra*, §§ 1362–1365, 1397; Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 Harv. L. Rev. 177 (1948).

tarily before submitting it to the jury for an assessment of its credibility. More specifically, we expressly rejected the proposition that a jury, when determining the confessor's guilt, could be relied on to ignore his confession of guilt should it find the confession involuntary. *Id.*, at 388–389. Significantly, we supported that conclusion in part by reliance upon the dissenting opinion of Mr. Justice Frankfurter for the four Justices who dissented in *Delli Paoli*. *Id.*, at 388, n. 15.

That dissent challenged the basic premise of *Delli Paoli* that a properly instructed jury would ignore the confessor's inculpation of the nonconfessor in determining the latter's guilt. "The fact of the matter is that too often such admonition against misuse is intrinsically ineffective in that the effect of such a nonadmissible declaration cannot be wiped from the brains of the jurors. The admonition therefore becomes a futile collocation of words and fails of its purpose as a legal protection to defendants against whom such a declaration should not tell." 352 U. S., at 247. The dissent went on to say, as quoted in the cited note in *Jackson*, "The government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds." *Id.*, at 248. To the same effect, and also cited in the *Jackson* note, is the statement of Mr. Justice Jackson in his concurring opinion in *Krulewitch* v. *United States*, 336 U. S. 440, 453: "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction. . . ." [4]

[4] Several cases since *Delli Paoli* have refused to consider an instruction as inevitably sufficient to avoid the setting aside of convictions. See, *e. g.*, *United States ex rel. Floyd* v. *Wilkins*, 367 F. 2d 990; *United States* v. *Bozza*, 365 F. 2d 206; *Greenwell* v. *United States*, 119 U. S. App. D. C. 43, 336 F. 2d 962; *Jones*

The significance of *Jackson* for *Delli Paoli* was suggested by Chief Justice Traynor in *People* v. *Aranda*, 63 Cal. 2d 518, 528–529, 407 P. 2d 265, 271–272:

> "Although *Jackson* was directly concerned with obviating any risk that a jury might rely on an unconstitutionally obtained confession in determining the defendant's guilt, its logic extends to obviating the risks that the jury may rely on any inadmissible statements. If it is a denial of due process to rely on a jury's presumed ability to disregard an involuntary confession, it may also be a denial of due process to rely on a jury's presumed ability to disregard a codefendant's confession implicating another defendant when it is determining that defendant's guilt or innocence.
>
> "Indeed, the latter task may be an even more difficult one for the jury to perform than the former. Under the New York procedure, which *Jackson* held violated due process, the jury was only required to

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v. *United States*, 119 U. S. App. D. C. 284, 342 F. 2d 863; *Barton* v. *United States*, 263 F. 2d 894; *United States ex rel. Hill* v. *Deegan*, 268 F. Supp. 580. In *Bozza* the Court of Appeals for the Second Circuit stated:

"It is impossible realistically to suppose that when the twelve good men and women had Jones' confession in the privacy of the jury room, not one yielded to the nigh irresistible temptation to fill in the blanks with the keys Kuhle had provided and ask himself the intelligent question to what extent Jones' statement supported Kuhle's testimony, or that if anyone did yield, his colleagues effectively persuaded him to dismiss the answers from his mind." 365 F. 2d, at 215.

State decisions which have rejected *Delli Paoli* include *People* v. *Aranda*, 63 Cal. 2d 518, 407 P. 2d 265; *State* v. *Young*, 46 N. J. 152, 215 A. 2d 352. See also *People* v. *Barbaro*, 395 Ill. 264, 69 N. E. 2d 692; *State* v. *Rosen*, 151 Ohio St. 339, 86 N. E. 2d 24.

It has been suggested that the limiting instruction actually compounds the jury's difficulty in disregarding the inadmissible hearsay. See Broeder, The University of Chicago Jury Project, 38 Neb. L. Rev. 744, 753–755 (1959).

> disregard a confession it found to be involuntary. If it made such a finding, then the confession was presumably out of the case. In joint trials, however, when the admissible confession of one defendant inculpates another defendant, the confession is never deleted from the case and the jury is expected to perform the overwhelming task of considering it in determining the guilt or innocence of the declarant and then of ignoring it in determining the guilt or innocence of any codefendants of the declarant. A jury cannot 'segregate evidence into separate intellectual boxes.' . . . It cannot determine that a confession is true insofar as it admits that A has committed criminal acts with B and at the same time effectively ignore the inevitable conclusion that B has committed those same criminal acts with A." [5]

In addition to *Jackson*, our action in 1966 in amending Rule 14 of the Federal Rules of Criminal Procedure also evidences our repudiation of *Delli Paoli*'s basic premise. Rule 14 authorizes a severance where it appears that a defendant might be prejudiced by a joint trial.[6] The Rule was amended in 1966 to provide expressly that "[i]n ruling on a motion by a defendant for severance the

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[5] See *Pointer* v. *Texas*, *supra*, at 405: "Indeed, we have expressly declared that to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law."

[6] Joinder of defendants is governed by Rules 8 (b) and 14 of the Federal Rules of Criminal Procedure. "The rules are designed to promote economy and efficiency and to avoid a multiplicity of trials, where these objectives can be achieved without substantial prejudice to the right of the defendants to a fair trial." *Daley* v. *United States*, 231 F. 2d 123, 125. An important element of a fair trial is that a jury consider only relevant and competent evidence bearing on the issue of guilt or innocence. See, *e. g.*, *Blumenthal* v. *United States*, 332 U. S. 539, 559–560.

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court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial." The Advisory Committee on Rules said in explanation of the amendment:

> "A defendant may be prejudiced by the admission in evidence against a co-defendant of a statement or confession made by that co-defendant. This prejudice cannot be dispelled by cross-examination if the co-defendant does not take the stand. Limiting instructions to the jury may not in fact erase the prejudice. . . .
>
> "The purpose of the amendment is to provide a procedure whereby the issue of possible prejudice can be resolved on the motion for severance. . . ." [7]

Those who have defended reliance on the limiting instruction in this area have cited several reasons in support. Judge Learned Hand, a particularly severe critic of the proposition that juries could be counted on to disregard inadmissible hearsay,[8] wrote the opinion for the

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[7] 34 F. R. D. 419. See generally Note, Joint and Single Trials Under Rules 8 and 14 of the Federal Rules of Criminal Procedure, 74 Yale L. J. 553 (1965).

[8] Judge Hand addressed the subject several times. The limiting instruction, he said, is a "recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's else," *Nash* v. *United States*, 54 F. 2d 1006, 1007; "Nobody can indeed fail to doubt whether the caution is effective, or whether usually the practical result is not to let in hearsay," *United States* v. *Gottfried*, 165 F. 2d 360, 367; "it is indeed very hard to believe that a jury will, or for that matter can, in practice observe the admonition," *Delli Paoli* v. *United States*, 229 F. 2d 319, 321. Judge Hand referred to the instruction as a "placebo," medically defined as "a medicinal lie." Judge Jerome Frank suggested that its legal equivalent "is a kind of 'judicial lie': It undermines a

Second Circuit which affirmed Delli Paoli's conviction. 229 F. 2d 319. In Judge Hand's view the limiting instruction, although not really capable of preventing the jury from considering the prejudicial evidence, does as a matter of form provide a way around the exclusionary rules of evidence that is defensible because it "probably furthers, rather than impedes, the search for truth . . . ." *Nash* v. *United States,* 54 F. 2d 1006, 1007. Insofar as this implies the prosecution ought not to be denied the benefit of the confession to prove the confessor's guilt,[9] however, it overlooks alternative ways of achieving that benefit without at the same time infringing the noncon-

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moral relationship between the courts, the jurors, and the public; like any other judicial deception, it damages the decent judicial administration of justice." *United States* v. *Grunewald,* 233 F. 2d 556, 574. See also 8 Wigmore, *supra,* n. 3, § 2272, at 416.

Compare E. Morgan, Some Problems of Proof Under the Anglo-American System of Litigation 105 (1956), who suggests that the use of limiting instructions fosters an inconsistent attitude toward juries by "treating them at times as a group of low-grade morons and at other times as men endowed with a superhuman ability to control their emotions and intellects." See also *Shepard* v. *United States,* 290 U. S. 96, 104; Meltzer, Involuntary Confessions: The Allocation of Responsibility Between Judge and Jury, 21 U. Chi. L. Rev. 317, 326 (1954).

[9] In this case, however, Evans' conviction was reversed on the ground that his confessions were inadmissible in evidence even against him, and on his retrial he was acquitted. In *People* v. *Aranda, supra,* 63 Cal. 2d, at 526, 407 P. 2d, at 270, it was said: "When, however, the confession implicating both defendants is not admissible at all, there is no longer room for compromise. The risk of prejudicing the nonconfessing defendant can no longer be justified by the need for introducing the confession against the one who made it. Accordingly, we have held that the erroneous admission into evidence of a confession implicating both defendants is not necessarily cured by an instruction that it is to be considered only against the declarant." See also *Jones* v. *United States* and *Greenwell* v. *United States,* both *supra,* n. 4.

fessor's right of confrontation.[10] Where viable alternatives do exist, it is deceptive to rely on the pursuit of truth to defend a clearly harmful practice.

Another reason cited in defense of *Delli Paoli* is the justification for joint trials in general, the argument being that the benefits of joint proceedings should not have to be sacrificed by requiring separate trials in order to use the confession against the declarant. Joint trials do conserve state funds, diminish inconvenience to witnesses and public authorities, and avoid delays in bringing those accused of crime to trial. But the answer to this argument was cogently stated by Judge Lehman of the New York Court of Appeals, dissenting in *People* v. *Fisher*, 249 N. Y. 419, 432, 164 N. E. 336, 341:

> "We still adhere to the rule that an accused is entitled to confrontation of the witnesses against him and the right to cross-examine them . . . . We destroy the age-old rule which in the past has been regarded as a fundamental principle of our juris-

[10] Some courts have required deletion of references to codefendants where practicable. See, *e. g.*, *Oliver* v. *United States*, 335 F. 2d 724; *People* v. *Vitagliano*, 15 N. Y. 2d 360, 206 N. E. 2d 864; *People* v. *La Belle*, 18 N. Y. 2d 405, 222 N. E. 2d 727. For criticisms suggesting that deletions (redaction) from the confession are ineffective, see, *e. g.*, Note, 72 Harv. L. Rev. 920, 990 (1959); Comment, 24 U. Chi. L. Rev. 710, 713 (1957); Note, 74 Yale L. J. 553, 564 (1965).

In this case Evans' confessions were offered in evidence through the oral testimony of the postal inspector. It has been said: "Where the confession is offered in evidence by means of oral testimony, redaction is patently impractical. To expect a witness to relate *X*'s confession without including any of its references to *Y* is to ignore human frailty. Again, it is unlikely that an intentional or accidental slip by the witness could be remedied by instructions to disregard." Note, 3 Col. J. of Law & Soc. Prob. 80, 88 (1967).

Some courts have promulgated rules governing the use of the confessions. See n. 4, *supra*. See also rules suggested by Judge Frank, dissenting in *Delli Paoli* v. *United States*, 229 F. 2d 319, 324.

> prudence by a legalistic formula, required of the judge, that the jury may not consider any admissions against any party who did not join in them. We secure greater speed, economy and convenience in the administration of the law at the price of fundamental principles of constitutional liberty. That price is too high."

Finally, the reason advanced by the majority in *Delli Paoli* was to tie the result to maintenance of the jury system. "Unless we proceed on the basis that the jury will follow the court's instructions where those instructions are clear and the circumstances are such that the jury can reasonably be expected to follow them, the jury system makes little sense." 352 U. S., at 242. We agree that there are many circumstances in which this reliance is justified. Not every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions; instances occur in almost every trial where inadmissible evidence creeps in, usually inadvertently. "A defendant is entitled to a fair trial but not a perfect one." *Lutwak* v. *United States,* 344 U. S. 604, 619; see *Hopt* v. *Utah,* 120 U. S. 430, 438; cf. Fed. Rule Crim. Proc. 52 (a). It is not unreasonable to conclude that in many such cases the jury can and will follow the trial judge's instructions to disregard such information. Nevertheless, as was recognized in *Jackson* v. *Denno, supra,* there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Compare *Hopt* v. *Utah, supra; Throckmorton* v. *Holt,* 180 U. S. 552, 567; *Mora* v. *United States,* 190 F. 2d 749; *Holt* v. *United States,* 94 F. 2d 90. Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant,

who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others.[11] The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination. It was against such threats to a fair trial that the Confrontation Clause was directed.[12] *Pointer* v. *Texas, supra.*

We, of course, acknowledge the impossibility of determining whether in fact the jury did or did not ignore Evans' statement inculpating petitioner in determining petitioner's guilt. But that was also true in the analogous situation in *Jackson* v. *Denno*, and was not regarded as militating against striking down the New York pro-

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[11] See *Crawford* v. *United States*, 212 U. S. 183, 204; *Caminetti* v. *United States*, 242 U. S. 470, 495; *Stoneking* v. *United States*, 232 F. 2d 385.

[12] It is suggested that because the evidence is so unreliable the need for cross-examination is obviated. This would certainly seem contrary to the acceptance of the rule of evidence which would require exclusion of the confession as to Bruton as "inadmissible hearsay, a presumptively unreliable out-of-court statement of a nonparty who was not a witness subject to cross-examination." *Post*, at 138. "The theory of the Hearsay rule is that the many possible deficiencies, suppressions, sources of error and untrustworthiness, which lie underneath the bare untested assertion of a witness, may be best brought to light and exposed by the test of Cross-examination." 5 Wigmore, Evidence § 1362, at 3. The reason for excluding this evidence as an *evidentiary* matter also requires its exclusion as a *constitutional* matter. Surely the suggestion is not that *Pointer* v. *Texas*, for example, be repudiated and that all hearsay evidence be admissible so long as the jury is properly instructed to weigh it in light of "all the dangers of inaccuracy which characterize hearsay generally." *Post*, at 141.

cedure there involved. It was enough that that procedure posed "substantial threats to a defendant's constitutional rights to have an involuntary confession entirely disregarded and to have the coercion issue fairly and reliably determined. These hazards we cannot ignore." 378 U. S., at 389. Here the introduction of Evans' confession posed a substantial threat to petitioner's right to confront the witnesses against him, and this is a hazard we cannot ignore. Despite the concededly clear instructions to the jury to disregard Evans' inadmissible hearsay evidence inculpating petitioner, in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination. The effect is the same as if there had been no instruction at all. See *Anderson* v. *United States,* 318 U. S. 350, 356–357; cf. *Burgett* v. *Texas,* 389 U. S. 109, 115.

Reversed.

MR. JUSTICE BLACK concurs in the result for the reasons stated in the dissent in *Delli Paoli* v. *United States,* 352 U. S. 232, 246.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

MR. JUSTICE STEWART, concurring.

I join the opinion and judgment of the Court. Although I did not agree with the decision in *Jackson* v. *Denno,* 378 U. S. 368 (see *id.,* at 427), I accept its holding and share the Court's conclusion that it compels the overruling of *Delli Paoli* v. *United States,* 352 U. S. 232.

Quite apart from *Jackson* v. *Denno,* however, I think it clear that the underlying rationale of the Sixth Amendment's Confrontation Clause precludes reliance upon cautionary instructions when the highly damaging out-of-

court statement of a codefendant, who is not subject to cross-examination, is deliberately placed before the jury at a joint trial. A basic premise of the Confrontation Clause, it seems to me, is that certain kinds of hearsay (see, *e. g., Pointer* v. *Texas,* 380 U. S. 400; *Douglas* v. *Alabama,* 380 U. S. 415) are at once so damaging, so suspect, and yet so difficult to discount, that jurors cannot be trusted to give such evidence the minimal weight it logically deserves, *whatever* instructions the trial judge might give. See the Court's opinion, *ante,* at 136, n. 12. It is for this very reason that an out-of-court accusation is universally conceded to be constitutionally *inadmissible* against the accused, rather than admissible for the little it may be worth. Even if I did not consider *Jackson* v. *Denno* controlling, therefore, I would still agree that *Delli Paoli* must be overruled.

MR. JUSTICE WHITE, dissenting.

Whether or not Evans' confession was inadmissible against him, nothing in that confession which was relevant and material to Bruton's case was admissible against Bruton. As to him it was inadmissible hearsay, a presumptively unreliable out-of-court statement of a nonparty who was not a witness subject to cross-examination. Admitting Evans' confession against Bruton would require a new trial unless the error was harmless.

The trial judge in this case had no different view. He admitted Evans' confession only against Evans, not against Bruton, and carefully instructed the jury to disregard it in determining Bruton's guilt or innocence.*

*As the Court observes, "[i]f . . . the jury disregarded the reference to the codefendant, no question would arise under the Confrontation Clause . . . ." *Ante,* at 126. Because in my view juries can reasonably be relied upon to disregard the codefendant's references to the defendant, there is no need to explore the special considerations involved in the Confrontation Clause.

Contrary to its ruling just a decade ago in *Delli Paoli* v. *United States*, 352 U. S. 232 (1957), the Court now holds this instruction insufficient and reverses Bruton's conviction. It would apparently also reverse every other case where a court admits a codefendant's confession implicating a defendant, regardless of cautionary instructions and regardless of the circumstances. I dissent from this excessively rigid rule. There is nothing in this record to suggest that the jury did not follow the trial judge's instructions. There has been no new learning since *Delli Paoli* indicating that juries are less reliable than they were considered in that case to be. There is nothing in the prior decisions of this Court which supports this new constitutional rule.

The Court concedes that there are many instances in which reliance on limiting instructions is justified—"Not every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions; instances occur in almost every trial where inadmissible evidence creeps in, usually inadvertently." *Ante*, at 135. The Court asserts, however, that the hazards to the defendant of permitting the jury to hear a codefendant's confession implicating him are so severe that we must assume the jury's inability to heed a limiting instruction. This was the holding of the Court with respect to a confession of the defendant himself in *Jackson* v. *Denno*, 378 U. S. 368 (1964). There are good reasons, however, for distinguishing the codefendant's confession from that of the defendant himself and for trusting in the jury's ability to disregard the former when instructed to do so.

First, the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. Though itself an out-of-court statement, it is admitted as reliable evidence because it is an admission of guilt by the defendant and constitutes

direct evidence of the facts to which it relates. Even the testimony of an eyewitness may be less reliable than the defendant's own confession. An observer may not correctly perceive, understand, or remember the acts of another, but the admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so. This was the conclusion of the Court in *Jackson*, and I continue to believe that case to be sound law.

Second, it must be remembered that a coerced confession is not excluded because it is thought to be unreliable. Regardless of how true it may be, it is excluded because specific provisions of the Constitution demand it, whatever the consequences for the criminal trial. In *Jackson* itself it was stated that "[i]t is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession . . . ." 378 U. S., at 376. See *id.*, at 385–386. In giving prospective effect only to its rules in *Miranda* v. *Arizona*, 384 U. S. 436 (1966), the Court specifically reaffirmed the principle that coerced confessions are inadmissible regardless of their truth or falsity, *Johnson* v. *New Jersey*, 384 U. S. 719, 729, n. 9 (1966). The Court acknowledged that the rules of *Miranda* apply to situations "in which the danger [of unreliable statements] is not necessarily as great as when the accused is subjected to overt and obvious coercion." *Id.*, at 730. And, in *Tehan* v. *United States ex rel. Shott*, 382 U. S. 406, 416 (1966), holding the rule of *Griffin* v. *California*, 380 U. S. 609 (1965), not retroactive, the Court quite explicitly stated that "the Fifth Amendment's privilege against self-incrimination is not

an adjunct to the ascertainment of truth. That privilege, like the guarantees of the Fourth Amendment, stands as a protection of quite different constitutional values . . . ." The exclusion of probative evidence in order to serve other ends is sound jurisprudence but, as the Court concluded in *Jackson* v. *Denno*, 378 U. S., at 382, juries would have great difficulty in understanding that policy, in putting the confession aside, and in finding the confession involuntary if the consequence was that it could not be used in considering a defendant's guilt or innocence.

The situation in this case is very different. Here we deal with a codefendant's confession which is admitted only against the codefendant and with a firm instruction to the jury to disregard it in determining the defendant's guilt or innocence. That confession cannot compare with the defendant's own confession in evidentiary value. As to the defendant, the confession of the codefendant is wholly inadmissible. It is hearsay, subject to all the dangers of inaccuracy which characterize hearsay generally. Furthermore, the codefendant is no more than an eyewitness, the accuracy of whose testimony about the defendant's conduct is open to more doubt than would be the defendant's own account of his actions. More than this, however, the statements of a codefendant have traditionally been viewed with special suspicion. *Crawford* v. *United States*, 212 U. S. 183, 204 (1909); *Holmgren* v. *United States*, 217 U. S. 509, 523–524 (1910). See also *Caminetti* v. *United States*, 242 U. S. 470, 495 (1917); Mathes, Jury Instruction and Forms for Federal Criminal Cases, 27 F. R. D. 39, 68–69 (1961). Due to his strong motivation to implicate the defendant and to exonerate himself, a codefendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence. Whereas the defendant's own confession possesses greater reliability and eviden-

tiary value than ordinary hearsay, the codefendant's confession implicating the defendant is intrinsically much less reliable.

The defendant's own confession may not be used against him if coerced, not because it is untrue but to protect other constitutional values. The jury may have great difficulty understanding such a rule and following an instruction to disregard the confession. In contrast, the codefendant's admissions cannot enter into the determination of the defendant's guilt or innocence because they are unreliable. This the jury can be told and can understand. Just as the Court believes that juries can reasonably be expected to disregard ordinary hearsay or other inadmissible evidence when instructed to do so, I believe juries will disregard the portions of a codefendant's confession implicating the defendant when so instructed. Indeed, if we must pick and choose between hearsay as to which limiting instructions will be deemed effective and hearsay the admission of which cannot be cured by instructions, codefendants' admissions belong in the former category rather than the latter, for they are not only hearsay but hearsay which is doubly suspect. If the Court is right in believing that a jury can be counted on to ignore a wide range of hearsay statements which it is told to ignore, it seems very odd to me to question its ability to put aside the codefendant's hearsay statements about what the defendant did.

It is a common experience of all men to be informed of "facts" relevant to an issue requiring their judgment, and yet to disregard those "facts" because of sufficient grounds for discrediting their veracity or the reliability of their source. Responsible judgment would be impossible but for the ability of men to focus their attention wholly on reliable and credible evidence, and jurymen are no less capable of exercising this capacity than other

men. Because I have no doubt that serious-minded and responsible men are able to shut their minds to unreliable information when exercising their judgment, I reject the assumption of the majority that giving instructions to a jury to disregard a codefendant's confession is an empty gesture.

The rule which the Court announces today will severely limit the circumstances in which defendants may be tried together for a crime which they are both charged with committing. Unquestionably, joint trials are more economical and minimize the burden on witnesses, prosecutors, and courts. They also avoid delays in bringing those accused of crime to trial. This much the Court concedes. It is also worth saying that separate trials are apt to have varying consequences for legally indistinguishable defendants. The unfairness of this is confirmed by the common prosecutorial experience of seeing codefendants who are tried separately strenuously jockeying for position with regard to who should be the first to be tried.

In view of the practical difficulties of separate trials and their potential unfairness, I am disappointed that the Court has not spelled out how the federal courts might conduct their business consistent with today's opinion. I would suppose that it will be necessary to exclude all extrajudicial confessions unless all portions of them which implicate defendants other than the declarant are effectively deleted. Effective deletion will probably require not only omission of all direct and indirect inculpations of codefendants but also of any statement that could be employed against those defendants once their identity is otherwise established. Of course, the deletion must not be such that it will distort the statements to the substantial prejudice of either the declarant or the Government. If deletion is not feasible, then the Government will have to choose either not to

use the confession at all or to try the defendants separately. To save time, money, and effort, the Government might best seek a ruling at the earliest possible stage of the trial proceedings as to whether the confession is admissible once offending portions are deleted. The failure of the Government to adopt and follow proper procedures for insuring that the inadmissible portions of confessions are excluded will be relevant to the question of whether it was harmless error for them to have gotten before the jury. Oral statements, such as that involved in the present case, will present special problems, for there is a risk that the witness in testifying will inadvertently exceed permissible limits. Except for recommending that caution be used with regard to such oral statements, it is difficult to anticipate the issues which will arise in concrete factual situations.

I would hope, but am not sure, that by using these procedures the federal courts would escape reversal under today's ruling. Even so, I persist in believing that the reversal of *Delli Paoli* unnecessarily burdens the already difficult task of conducting criminal trials, and therefore I dissent in this case.

MR. JUSTICE HARLAN joins this opinion without abandoning his original disagreement with *Jackson* v. *Denno*, 378 U. S. 368, 427, expressed in his dissenting opinion in that case.

DUNCAN *v.* LOUISIANA.

APPEAL FROM THE SUPREME COURT OF LOUISIANA.

No. 410. Argued January 17, 1968.—Decided May 20, 1968.

Under Louisiana law simple battery is a misdemeanor punishable by a maximum of two years' imprisonment and a $300 fine. Appellant was convicted of simple battery and sentenced to 60 days in prison and a fine of $150. He had requested a jury trial which was denied because the Louisiana Constitution grants jury trials only in cases where capital punishment or imprisonment at hard labor may be imposed. The Louisiana Supreme Court denied certiorari. *Held:*

1. Since trial by jury in criminal cases is fundamental to the American scheme of justice, the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which, were they tried in a federal court, would come within the Sixth Amendment's guarantee of trial by jury. Pp. 147–158.

2. The penalty authorized for a particular crime is of major relevance in determining whether it is a serious one subject to the mandates of the Sixth Amendment, and it is sufficient here, without defining the boundary between petty offenses and serious crimes, to hold that a crime punishable by two years in prison is a serious crime and that appellant was entitled to a jury trial. Pp. 159–162.

250 La. 253, 195 So. 2d 142, reversed and remanded.

Richard B. Sobol argued the cause for appellant. With him on the briefs were *Alvin J. Bronstein* and *Anthony G. Amsterdam.*

Dorothy D. Wolbrette, Assistant Attorney General of Louisiana, argued the cause for appellee. With her on the brief were *Jack P. F. Gremillion,* Attorney General, *William P. Schuler,* Second Assistant Attorney General, *L. K. Clement, Jr.,* and *John M. Currier,* Assistant Attorneys General, *Leander H. Perez, Jr.,* and *Lawrence L. McNamara.*

Louis J. Lefkowitz, Attorney General, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Michael H.*

Rauch, Assistant Attorney General, filed a brief for the State of New York, as *amicus curiae*.

MR. JUSTICE WHITE delivered the opinion of the Court.

Appellant, Gary Duncan, was convicted of simple battery in the Twenty-fifth Judicial District Court of Louisiana. Under Louisiana law simple battery is a misdemeanor, punishable by a maximum of two years' imprisonment and a $300 fine. Appellant sought trial by jury, but because the Louisiana Constitution grants jury trials only in cases in which capital punishment or imprisonment at hard labor may be imposed,[1] the trial judge denied the request. Appellant was convicted and sentenced to serve 60 days in the parish prison and pay a fine of $150. Appellant sought review in the Supreme Court of Louisiana, asserting that the denial of jury trial violated rights guaranteed to him by the United States Constitution. The Supreme Court, finding "[n]o error of law in the ruling complained of," denied appellant a writ of certiorari.[2] Pursuant to 28 U. S. C.

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[1] La. Const., Art. VII, § 41:

"All cases in which the punishment may not be at hard labor shall . . . be tried by the judge without a jury. Cases, in which the punishment may be at hard labor, shall be tried by a jury of five, all of whom must concur to render a verdict; cases, in which the punishment is necessarily at hard labor, by a jury of twelve, nine of whom must concur to render a verdict; cases in which the punishment may be capital, by a jury of twelve, all of whom must concur to render a verdict."

La. Rev. Stat. § 14:35 (1950):

"Simple battery is a battery, without the consent of the victim, committed without a dangerous weapon.

"Whoever commits a simple battery shall be fined not more than three hundred dollars, or imprisoned for not more than two years, or both."

[2] 250 La. 253, 195 So. 2d 142 (1967).

§ 1257 (2) appellant sought review in this Court, alleging that the Sixth and Fourteenth Amendments to the United States Constitution secure the right to jury trial in state criminal prosecutions where a sentence as long as two years may be imposed. We noted probable jurisdiction,[3] and set the case for oral argument with No. 52, *Bloom* v. *Illinois, post,* p. 194.

Appellant was 19 years of age when tried. While driving on Highway 23 in Plaquemines Parish on October 18, 1966, he saw two younger cousins engaged in a conversation by the side of the road with four white boys. Knowing his cousins, Negroes who had recently transferred to a formerly all-white high school, had reported the occurrence of racial incidents at the school, Duncan stopped the car, got out, and approached the six boys. At trial the white boys and a white onlooker testified, as did appellant and his cousins. The testimony was in dispute on many points, but the witnesses agreed that appellant and the white boys spoke to each other, that appellant encouraged his cousins to break off the encounter and enter his car, and that appellant was about to enter the car himself for the purpose of driving away with his cousins. The whites testified that just before getting in the car appellant slapped Herman Landry, one of the white boys, on the elbow. The Negroes testified that appellant had not slapped Landry, but had merely touched him. The trial judge concluded that the State had proved beyond a reasonable doubt that Duncan had committed simple battery, and found him guilty.

I.

The Fourteenth Amendment denies the States the power to "deprive any person of life, liberty, or property, without due process of law." In resolving conflicting

[3] 389 U. S. 809 (1967).

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claims concerning the meaning of this spacious language, the Court has looked increasingly to the Bill of Rights for guidance; many of the rights guaranteed by the first eight Amendments to the Constitution have been held to be protected against state action by the Due Process Clause of the Fourteenth Amendment. That clause now protects the right to compensation for property taken by the State;[4] the rights of speech, press, and religion covered by the First Amendment;[5] the Fourth Amendment rights to be free from unreasonable searches and seizures and to have excluded from criminal trials any evidence illegally seized;[6] the right guaranteed by the Fifth Amendment to be free of compelled self-incrimination;[7] and the Sixth Amendment rights to counsel,[8] to a speedy[9] and public[10] trial, to confrontation of opposing witnesses,[11] and to compulsory process for obtaining witnesses.[12]

The test for determining whether a right extended by the Fifth and Sixth Amendments with respect to federal criminal proceedings is also protected against state action by the Fourteenth Amendment has been phrased in a variety of ways in the opinions of this Court. The question has been asked whether a right is among those "'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,'" *Powell* v. *Alabama*, 287 U. S. 45, 67 (1932);[13] whether

[4] *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226 (1897).
[5] See, *e. g.*, *Fiske* v. *Kansas*, 274 U. S. 380 (1927).
[6] See *Mapp* v. *Ohio*, 367 U. S. 643 (1961).
[7] *Malloy* v. *Hogan*, 378 U. S. 1 (1964).
[8] *Gideon* v. *Wainwright*, 372 U. S. 335 (1963).
[9] *Klopfer* v. *North Carolina*, 386 U. S. 213 (1967).
[10] *In re Oliver*, 333 U. S. 257 (1948).
[11] *Pointer* v. *Texas*, 380 U. S. 400 (1965).
[12] *Washington* v. *Texas*, 388 U. S. 14 (1967).
[13] Quoting from *Hebert* v. *Louisiana*, 272 U. S. 312, 316 (1926).

it is "basic in our system of jurisprudence," *In re Oliver*, 333 U. S. 257, 273 (1948); and whether it is "a fundamental right, essential to a fair trial," *Gideon* v. *Wainwright*, 372 U. S. 335, 343–344 (1963); *Malloy* v. *Hogan*, 378 U. S. 1, 6 (1964); *Pointer* v. *Texas*, 380 U. S. 400, 403 (1965). The claim before us is that the right to trial by jury guaranteed by the Sixth Amendment meets these tests. The position of Louisiana, on the other hand, is that the Constitution imposes upon the States no duty to give a jury trial in any criminal case, regardless of the seriousness of the crime or the size of the punishment which may be imposed. Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee.[14] Since we consider the appeal be-

[14] In one sense recent cases applying provisions of the first eight Amendments to the States represent a new approach to the "incorporation" debate. Earlier the Court can be seen as having asked, when inquiring into whether some particular procedural safeguard was required of a State, if a civilized system could be imagined that would not accord the particular protection. For example, *Palko* v. *Connecticut*, 302 U. S. 319, 325 (1937), stated: "The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty. . . . Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them." The recent cases, on the other hand, have proceeded upon the valid assumption that state criminal processes are not imaginary and theoretical schemes but actual systems bearing virtually every characteristic of the common-law system that has been developing contemporaneously in England and in this country. The question thus is whether given this kind of system a particular procedure is

fore us to be such a case, we hold that the Constitution was violated when appellant's demand for jury trial was refused.

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fundamental—whether, that is, a procedure is necessary to an Anglo-American regime of ordered liberty. It is this sort of inquiry that can justify the conclusions that state courts must exclude evidence seized in violation of the Fourth Amendment, *Mapp* v. *Ohio*, 367 U. S. 643 (1961); that state prosecutors may not comment on a defendant's failure to testify, *Griffin* v. *California*, 380 U. S. 609 (1965); and that criminal punishment may not be imposed for the status of narcotics addiction, *Robinson* v. *California*, 370 U. S. 660 (1962). Of immediate relevance for this case are the Court's holdings that the States must comply with certain provisions of the Sixth Amendment, specifically that the States may not refuse a speedy trial, confrontation of witnesses, and the assistance, at state expense if necessary, of counsel. See cases cited in nn. 8–12, *supra*. Of each of these determinations that a constitutional provision originally written to bind the Federal Government should bind the States as well it might be said that the limitation in question is not necessarily fundamental to fairness in every criminal system that might be imagined but is fundamental in the context of the criminal processes maintained by the American States.

When the inquiry is approached in this way the question whether the States can impose criminal punishment without granting a jury trial appears quite different from the way it appeared in the older cases opining that States might abolish jury trial. See, *e. g.*, *Maxwell* v. *Dow*, 176 U. S. 581 (1900). A criminal process which was fair and equitable but used no juries is easy to imagine. It would make use of alternative guarantees and protections which would serve the purposes that the jury serves in the English and American systems. Yet no American State has undertaken to construct such a system. Instead, every American State, including Louisiana, uses the jury extensively, and imposes very serious punishments only after a trial at which the defendant has a right to a jury's verdict. In every State, including Louisiana, the structure and style of the criminal process—the supporting framework and the subsidiary procedures—are of the sort that naturally complement jury trial, and have developed in connection with and in reliance upon jury trial.

The history of trial by jury in criminal cases has been frequently told.[15] It is sufficient for present purposes to say that by the time our Constitution was written, jury trial in criminal cases had been in existence in England for several centuries and carried impressive credentials traced by many to Magna Carta.[16] Its preservation and proper operation as a protection against arbitrary rule were among the major objectives of the revolutionary settlement which was expressed in the Declaration and Bill of Rights of 1689. In the 18th century Blackstone could write:

> "Our law has therefore wisely placed this strong and two-fold barrier, of a presentment and a trial by jury, between the liberties of the people and the prerogative of the crown. It was necessary, for preserving the admirable balance of our constitution, to vest the executive power of the laws in the prince: and yet this power might be dangerous and destructive to that very constitution, if exerted without check or control, by justices of *oyer* and *terminer* occasionally named by the crown; who might then, as in France or Turkey, imprison, dispatch, or exile any man that was obnoxious to the government, by an instant declaration that such is their will and pleasure. But the founders of the English law have, with excellent forecast, contrived that . . . the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unani-

[15] *E. g.*, W. Forsyth, History of Trial by Jury (1852); J. Thayer, A Preliminary Treatise on Evidence at the Common Law (1898); W. Holdsworth, History of English Law.

[16] *E. g.*, 4 W. Blackstone, Commentaries on the Laws of England 349 (Cooley ed. 1899). Historians no longer accept this pedigree. See, *e. g.*, 1 F. Pollock & F. Maitland, The History of English Law Before the Time of Edward I, at 173, n. 3 (2d ed. 1909).

> mous suffrage of twelve of his equals and neighbours, indifferently chosen and superior to all suspicion." [17]

Jury trial came to America with English colonists, and received strong support from them. Royal interference with the jury trial was deeply resented. Among the resolutions adopted by the First Congress of the American Colonies (the Stamp Act Congress) on October 19, 1765—resolutions deemed by their authors to state "the most essential rights and liberties of the colonists" [18]—was the declaration:

> "That trial by jury is the inherent and invaluable right of every British subject in these colonies."

The First Continental Congress, in the resolve of October 14, 1774, objected to trials before judges dependent upon the Crown alone for their salaries and to trials in England for alleged crimes committed in the colonies; the Congress therefore declared:

> "That the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law." [19]

The Declaration of Independence stated solemn objections to the King's making "Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries," to his "depriving us in many cases, of the benefits of Trial by Jury," and to his "transporting us beyond Seas to be tried for pretended offenses." The Constitution itself, in Art. III, § 2, commanded:

> "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall

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[17] Blackstone, *supra*, at 349–350.

[18] R. Perry, ed., Sources of Our Liberties 270 (1959).

[19] *Id.*, at 288.

> be held in the State where the said Crimes shall have been committed."

Objections to the Constitution because of the absence of a bill of rights were met by the immediate submission and adoption of the Bill of Rights. Included was the Sixth Amendment which, among other things, provided:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." [20]

The constitutions adopted by the original States guaranteed jury trial. Also, the constitution of every State entering the Union thereafter in one form or another protected the right to jury trial in criminal cases.

Even such skeletal history is impressive support for considering the right to jury trial in criminal cases to be fundamental to our system of justice, an importance

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[20] Among the proposed amendments adopted by the House of Representatives in 1789 and submitted to the Senate was Article Fourteen:

"No State shall infringe the right of trial by Jury in criminal cases, nor the rights of conscience, nor the freedom of speech, or of the press."

The Senate deleted this article in adopting the amendments which became the Bill of Rights. Journal of the First Session of the Senate 72; 1 Annals of Congress 76; Brennan, The Bill of Rights and the States, in E. Cahn, The Great Rights 65, 69 (1963); E. Dumbauld, The Bill of Rights 46, 215 (1957). This relatively clear indication that the framers of the Sixth Amendment did not intend its jury trial requirement to bind the States is, of course, of little relevance to interpreting the Due Process Clause of the Fourteenth Amendment, adopted specifically to place limitations upon the States. Cf. *Fiske* v. *Kansas*, 274 U. S. 380 (1927); *Gitlow* v. *New York*, 268 U. S. 652, 666 (1925).

frequently recognized in the opinions of this Court. For example, the Court has said:

> "Those who emigrated to this country from England brought with them this great privilege 'as their birthright and inheritance, as a part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power.' " [21]

Jury trial continues to receive strong support. The laws of every State guarantee a right to jury trial in serious criminal cases; no State has dispensed with it; nor are there significant movements underway to do so. Indeed, the three most recent state constitutional revisions, in Maryland, Michigan, and New York, carefully preserved the right of the accused to have the judgment of a jury when tried for a serious crime.[22]

We are aware of prior cases in this Court in which the prevailing opinion contains statements contrary to our holding today that the right to jury trial in serious criminal cases is a fundamental right and hence must be recognized by the States as part of their obligation to extend due process of law to all persons within their jurisdiction. Louisiana relies especially on *Maxwell* v. *Dow*, 176 U. S. 581 (1900); *Palko* v. *Connecticut*, 302 U. S. 319 (1937); and *Snyder* v. *Massachusetts*, 291 U. S. 97 (1934). None of these cases, however, dealt with a State which had purported to dispense entirely with a

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[21] *Thompson* v. *Utah*, 170 U. S. 343, 349–350 (1898), quoting 2 J. Story, Commentaries on the Constitution of the United States § 1779. See also *Irvin* v. *Dowd*, 366 U. S. 717, 721–722 (1961); *United States ex rel. Toth* v. *Quarles*, 350 U. S. 11, 16 (1955); *Ex parte Milligan*, 4 Wall. 2, 122–123 (1866); *People* v. *Garbutt*, 17 Mich. 9, 27 (1868).

[22] Proposed Maryland Constitution, Art. 1, § 1.07 (defeated at referendum May 14, 1968); Michigan Constitution, Art. 1, § 14; Proposed New York Constitution, Art. 1, § 7b (defeated at referendum Nov. 7, 1967).

jury trial in serious criminal cases. *Maxwell* held that no provision of the Bill of Rights applied to the States—a position long since repudiated—and that the Due Process Clause of the Fourteenth Amendment did not prevent a State from trying a defendant for a noncapital offense with fewer than 12 men on the jury. It did not deal with a case in which no jury at all had been provided. In neither *Palko* nor *Snyder* was jury trial actually at issue, although both cases contain important dicta asserting that the right to jury trial is not essential to ordered liberty and may be dispensed with by the States regardless of the Sixth and Fourteenth Amendments. These observations, though weighty and respectable, are nevertheless dicta, unsupported by holdings in this Court that a State may refuse a defendant's demand for a jury trial when he is charged with a serious crime. Perhaps because the right to jury trial was not directly at stake, the Court's remarks about the jury in *Palko* and *Snyder* took no note of past or current developments regarding jury trials, did not consider its purposes and functions, attempted no inquiry into how well it was performing its job, and did not discuss possible distinctions between civil and criminal cases. In *Malloy* v. *Hogan*, *supra*, the Court rejected *Palko*'s discussion of the self-incrimination clause. Respectfully, we reject the prior dicta regarding jury trial in criminal cases.

The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government.[23]

[23] "The [jury trial] clause was clearly intended to protect the accused from oppression by the Government . . . ." *Singer* v. *United States*, 380 U. S. 24, 31 (1965).

"The first object of any tyrant in Whitehall would be to make Parliament utterly subservient to his will; and the next to overthrow or diminish trial by jury, for no tyrant could afford to leave

Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence. The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States.

Of course jury trial has "its weaknesses and the potential for misuse," *Singer* v. *United States*, 380 U. S. 24, 35 (1965). We are aware of the long debate, especially in this century, among those who write about the admin-

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a subject's freedom in the hands of twelve of his countrymen. So that trial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives." P. Devlin, Trial by Jury 164 (1956).

istration of justice, as to the wisdom of permitting untrained laymen to determine the facts in civil and criminal proceedings.[24] Although the debate has been intense, with powerful voices on either side, most of the controversy has centered on the jury in civil cases. Indeed, some of the severest critics of civil juries acknowledge that the arguments for criminal juries are much stronger.[25] In addition, at the heart of the dispute have been express or implicit assertions that juries are incapable of adequately understanding evidence or determining issues of fact, and that they are unpredictable, quixotic, and little better than a roll of dice. Yet, the most recent and exhaustive study of the jury in criminal cases concluded that juries do understand the evidence and come to sound conclusions in most of the cases presented to them and that when juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created and for which they are now employed.[26]

The State of Louisiana urges that holding that the Fourteenth Amendment assures a right to jury trial will cast doubt on the integrity of every trial conducted without a jury. Plainly, this is not the import of our holding. Our conclusion is that in the American States, as in the federal judicial system, a general grant of jury trial for

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[24] A thorough summary of the arguments that have been made for and against jury trial and an extensive bibliography of the relevant literature is available at Hearings on Recording of Jury Deliberations before the Subcommittee to Investigate the Administration of the Internal Security Act of the Senate Committee on the Judiciary, 84th Cong., 1st Sess., 63–81 (1955). A more selective bibliography appears at H. Kalven, Jr. & H. Zeisel, The American Jury 4, n. 2 (1966).

[25] *E. g.*, J. Frank, Courts on Trial 145 (1949); H. Sidgwick, The Elements of Politics 498 (4th ed. 1919).

[26] Kalven & Zeisel, n. 24, *supra*.

serious offenses is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants. We would not assert, however, that every criminal trial—or any particular trial—held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury. Thus we hold no constitutional doubts about the practices, common in both federal and state courts, of accepting waivers of jury trial [27] and prosecuting petty crimes without extending a right to jury trial.[28] However, the fact is that in most places more trials for serious crimes are to juries than to a court alone; a great many defendants prefer the judgment of a jury to that of a court.[29] Even where defendants are satisfied with bench trials, the right to a jury trial very likely serves its intended purpose of making judicial or prosecutorial unfairness less likely.[30]

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[27] See *Patton* v. *United States*, 281 U. S. 276 (1930).

[28] See Part II, *infra*.

[29] Kalven & Zeisel, n. 24, *supra*, c. 2.

[30] Louisiana also asserts that if due process is deemed to include the right to jury trial, States will be obligated to comply with all past interpretations of the Sixth Amendment, an amendment which in its inception was designed to control only the federal courts and which throughout its history has operated in this limited environment where uniformity is a more obvious and immediate consideration. In particular, Louisiana objects to application of the decisions of this Court interpreting the Sixth Amendment as guaranteeing a 12-man jury in serious criminal cases, *Thompson* v. *Utah*, 170 U. S. 343 (1898); as requiring a unanimous verdict before guilt can be found, *Maxwell* v. *Dow*, 176 U. S. 581, 586 (1900); and as barring procedures by which crimes subject to the Sixth Amendment jury trial provision are tried in the first instance without a jury but at the first appellate stage by *de novo* trial with a jury, *Callan* v. *Wilson*, 127 U. S. 540, 557 (1888). It seems very unlikely to us that our decision today will require widespread changes in state criminal processes. First, our decisions interpreting the Sixth Amendment are always subject to reconsideration, a fact amply demonstrated by the instant decision. In addition, most of the

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Louisiana's final contention is that even if it must grant jury trials in serious criminal cases, the conviction before us is valid and constitutional because here the petitioner was tried for simple battery and was sentenced to only 60 days in the parish prison. We are not persuaded. It is doubtless true that there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision [31] and should not be subject to the Fourteenth Amendment jury trial requirement here applied to the States. Crimes carrying possible penalties up to six months do not require a jury trial if they otherwise qualify as petty offenses, *Cheff* v. *Schnackenberg*, 384 U. S. 373 (1966). But the penalty authorized for a particular crime is of major relevance in determining whether it is serious or not and may in itself, if severe enough, subject the trial to the mandates of the Sixth Amendment. *District of Columbia* v.

States have provisions for jury trials equal in breadth to the Sixth Amendment, if that amendment is construed, as it has been, to permit the trial of petty crimes and offenses without a jury. Indeed, there appear to be only four States in which juries of fewer than 12 can be used without the defendant's consent for offenses carrying a maximum penalty of greater than one year. Only in Oregon and Louisiana can a less-than-unanimous jury convict for an offense with a maximum penalty greater than one year. However 10 States authorize first-stage trials without juries for crimes carrying lengthy penalties; these States give a convicted defendant the right to a *de novo* trial before a jury in a different court. The statutory provisions are listed in the briefs filed in this case.

[31] *Cheff* v. *Schnackenberg*, 384 U. S. 373 (1966); *District of Columbia* v. *Clawans*, 300 U. S. 617 (1937); *Schick* v. *United States*, 195 U. S. 65 (1904); *Natal* v. *Louisiana*, 139 U. S. 621 (1891); see *Callan* v. *Wilson*, 127 U. S. 540 (1888). See generally Frankfurter & Corcoran, Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury, 39 Harv. L. Rev. 917 (1926); Kaye, Petty Offenders Have No Peers!, 26 U. Chi. L. Rev. 245 (1959).

Clawans, 300 U. S. 617 (1937). The penalty authorized by the law of the locality may be taken "as a gauge of its social and ethical judgments," 300 U. S., at 628, of the crime in question. In *Clawans* the defendant was jailed for 60 days, but it was the 90-day authorized punishment on which the Court focused in determining that the offense was not one for which the Constitution assured trial by jury. In the case before us the Legislature of Louisiana has made simple battery a criminal offense punishable by imprisonment for up to two years and a fine. The question, then, is whether a crime carrying such a penalty is an offense which Louisiana may insist on trying without a jury.

We think not. So-called petty offenses were tried without juries both in England and in the Colonies and have always been held to be exempt from the otherwise comprehensive language of the Sixth Amendment's jury trial provisions. There is no substantial evidence that the Framers intended to depart from this established common-law practice, and the possible consequences to defendants from convictions for petty offenses have been thought insufficient to outweigh the benefits to efficient law enforcement and simplified judicial administration resulting from the availability of speedy and inexpensive nonjury adjudications. These same considerations compel the same result under the Fourteenth Amendment. Of course the boundaries of the petty offense category have always been ill-defined, if not ambulatory. In the absence of an explicit constitutional provision, the definitional task necessarily falls on the courts, which must either pass upon the validity of legislative attempts to identify those petty offenses which are exempt from jury trial or, where the legislature has not addressed itself to the problem, themselves face the question in the first instance. In either case it is necessary to draw a line in the spectrum of crime, separating petty from serious

infractions. This process, although essential, cannot be wholly satisfactory, for it requires attaching different consequences to events which, when they lie near the line, actually differ very little.

In determining whether the length of the authorized prison term or the seriousness of other punishment is enough in itself to require a jury trial, we are counseled by *District of Columbia* v. *Clawans, supra,* to refer to objective criteria, chiefly the existing laws and practices in the Nation. In the federal system, petty offenses are defined as those punishable by no more than six months in prison and a $500 fine.[32] In 49 of the 50 States crimes subject to trial without a jury, which occasionally include simple battery, are punishable by no more than one year in jail.[33] Moreover, in the late 18th century in America crimes triable without a jury were for the most part punishable by no more than a six-month prison term, although there appear to have been exceptions to this rule.[34] We need not, however, settle in this case the exact location of the line between petty offenses and serious crimes. It is sufficient for our purposes to hold

[32] 18 U. S. C. § 1.

[33] Indeed, there appear to be only two instances, aside from the Louisiana scheme, in which a State denies jury trial for a crime punishable by imprisonment for longer than six months. New Jersey's disorderly conduct offense, N. J. Stat. Ann. § 2A:169–4 (1953), carries a one-year maximum sentence but no jury trial. The denial of jury trial was upheld by a 4–3 vote against state constitutional attack in *State* v. *Maier,* 13 N. J. 235, 99 A. 2d 21 (1953). New York State provides a jury within New York City only for offenses bearing a maximum sentence greater than one year. See *People* v. *Sanabria,* 42 Misc. 2d 464, 249 N. Y. S. 2d 66 (Sup. Ct. 1964).

[34] Frankfurter & Corcoran, n. 31, *supra.* In the instant case Louisiana has not argued that a penalty of two years' imprisonment is sufficiently short to qualify as a "petty offense," but only that the penalty actually imposed on Duncan, imprisonment for 60 days, is within the petty offense category.

that a crime punishable by two years in prison is, based on past and contemporary standards in this country, a serious crime and not a petty offense.[35] Consequently, appellant was entitled to a jury trial and it was error to deny it.

The judgment below is reversed and the case is remanded for proceedings not inconsistent with this opinion.

[For concurring opinion of MR. JUSTICE FORTAS, see *post*, p. 211.]

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, concurring.

The Court today holds that the right to trial by jury guaranteed defendants in criminal cases in federal courts by Art. III of the United States Constitution and by the Sixth Amendment is also guaranteed by the Fourteenth Amendment to defendants tried in state courts. With

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[35] It is argued that *Cheff* v. *Schnackenberg*, 384 U. S. 373 (1966), interpreted the Sixth Amendment as meaning that to the extent that the length of punishment is a relevant criterion in distinguishing between serious crimes and petty offenses, the critical factor is not the length of the sentence authorized but the length of the penalty actually imposed. In our view that case does not reach the situation where a legislative judgment as to the seriousness of the crime is imbedded in the statute in the form of an express authorization to impose a heavy penalty for the crime in question. *Cheff* involved criminal contempt, an offense applied to a wide range of conduct including conduct not so serious as to require jury trial absent a long sentence. In addition criminal contempt is unique in that legislative bodies frequently authorize punishment without stating the extent of the penalty which can be imposed. The contempt statute under which *Cheff* was prosecuted, 18 U. S. C. § 401, treated the extent of punishment as a matter to be determined by the forum court. It is therefore understandable that this Court in *Cheff* seized upon the penalty actually imposed as the best evidence of the seriousness of the offense for which *Cheff* was tried.

this holding I agree for reasons given by the Court. I also agree because of reasons given in my dissent in *Adamson* v. *California*, 332 U. S. 46, 68. In that dissent, at 90, I took the position, contrary to the holding in *Twining* v. *New Jersey*, 211 U. S. 78, that the Fourteenth Amendment made all of the provisions of the Bill of Rights applicable to the States. This Court in *Palko* v. *Connecticut*, 302 U. S. 319, 323, decided in 1937, although saying "[t]here is no such general rule," went on to add that the Fourteenth Amendment may make it unlawful for a State to abridge by its statutes the

> "freedom of speech which the First Amendment safeguards against encroachment by the Congress . . . or the like freedom of the press . . . or the free exercise of religion . . . or the right of peaceable assembly . . . or the right of one accused of crime to the benefit of counsel . . . . In these and other situations immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states." *Id.*, at 324–325.

And the *Palko* opinion went on to explain, 302 U. S., at 326, that certain Bill of Rights' provisions were made applicable to the States by bringing them "within the Fourteenth Amendment by a process of absorption." Thus *Twining* v. *New Jersey*, *supra*, refused to hold that any one of the Bill of Rights' provisions was made applicable to the States by the Fourteenth Amendment, but *Palko*, which must be read as overruling *Twining* on this point, concluded that the Bill of Rights Amendments that are "implicit in the concept of ordered liberty" are "absorbed" by the Fourteenth as protections against

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state invasion. In this situation I said in *Adamson* v. *California*, 332 U. S., at 89, that, while "I would . . . extend to all the people of the nation the complete protection of the Bill of Rights," that "[i]f the choice must be between the selective process of the *Palko* decision applying some of the Bill of Rights to the States, or the *Twining* rule applying none of them, I would choose the *Palko* selective process." See *Gideon* v. *Wainwright*, 372 U. S. 335. And I am very happy to support this selective process through which our Court has since the *Adamson* case held most of the specific Bill of Rights' protections applicable to the States to the same extent they are applicable to the Federal Government. Among these are the right to trial by jury decided today, the right against compelled self-incrimination, the right to counsel, the right to compulsory process for witnesses, the right to confront witnesses, the right to a speedy and public trial, and the right to be free from unreasonable searches and seizures.

All of these holdings making Bill of Rights' provisions applicable as such to the States mark, of course, a departure from the *Twining* doctrine holding that none of those provisions were enforceable as such against the States. The dissent in this case, however, makes a spirited and forceful defense of that now discredited doctrine. I do not believe that it is necessary for me to repeat the historical and logical reasons for my challenge to the *Twining* holding contained in my *Adamson* dissent and Appendix to it. What I wrote there in 1947 was the product of years of study and research. My appraisal of the legislative history followed 10 years of legislative experience as a Senator of the United States, not a bad way, I suspect, to learn the value of what is said in legislative debates, committee discussions, committee reports, and various other steps taken in the course of passage of bills, resolutions,

and proposed constitutional amendments. My Brother HARLAN's objections to my *Adamson* dissent history, like that of most of the objectors, relies most heavily on a criticism written by Professor Charles Fairman and published in the Stanford Law Review. 2 Stan. L. Rev. 5 (1949). I have read and studied this article extensively, including the historical references, but am compelled to add that in my view it has completely failed to refute the inferences and arguments that I suggested in my *Adamson* dissent. Professor Fairman's "history" relies very heavily on what was *not* said in the state legislatures that passed on the Fourteenth Amendment. Instead of relying on this kind of negative pregnant, my legislative experience has convinced me that it is far wiser to rely on what *was* said, and most importantly, said by the men who actually sponsored the Amendment in the Congress. I know from my years in the United States Senate that it is to men like Congressman Bingham, who steered the Amendment through the House, and Senator Howard, who introduced it in the Senate, that members of Congress look when they seek the real meaning of what is being offered. And they vote for or against a bill based on what the sponsors of that bill and those who oppose it tell them it means. The historical appendix to my *Adamson* dissent leaves no doubt in my mind that both its sponsors and those who opposed it believed the Fourteenth Amendment made the first eight Amendments of the Constitution (the Bill of Rights) applicable to the States.

In addition to the adoption of Professor Fairman's "history," the dissent states that "the great words of the four clauses of the first section of the Fourteenth Amendment would have been an exceedingly peculiar way to say that 'The rights heretofore guaranteed against federal intrusion by the first eight Amendments are henceforth guaranteed against state intrusion as

well.'" Dissenting opinion, n. 9. In response to this I can say only that the words "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" seem to me an eminently reasonable way of expressing the idea that henceforth the Bill of Rights shall apply to the States.[1] What more precious "privilege" of American citizenship could there be than that privilege to claim the protections of our great Bill of Rights? I suggest that any reading of "privileges or immunities of citizens of the United States" which excludes the Bill of Rights' safeguards renders the words of this section of the Fourteenth Amendment meaningless. Senator Howard, who introduced the Fourteenth Amendment for passage in the Senate, certainly read the words this way. Although I have cited his speech at length in my *Adamson* dissent appendix, I believe it would be worthwhile to reproduce a part of it here.

> "Such is the character of the privileges and immunities spoken of in the second section of the fourth article of the Constitution [the Senator had just read from the old opinion of *Corfield* v. *Coryell*, 6 Fed. Cas. 546 (No. 3,230) (E. D. Pa. 1825)]. To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added the personal rights guarantied and secured by the first eight amendments of the Constitution; such as the freedom of speech and of the press; the right of the people peaceably to assemble and petition the Government for a redress of grievances, a right ap-

[1] My view has been and is that the Fourteenth Amendment, *as a whole*, makes the Bill of Rights applicable to the States. This would certainly include the language of the Privileges and Immunities Clause, as well as the Due Process Clause.

pertaining to each and all the people; the right to keep and to bear arms; the right to be exempted from the quartering of soldiers in a house without the consent of the owner; the right to be exempt from unreasonable searches and seizures, and from any search or seizure except by virtue of a warrant issued upon a formal oath or affidavit; the right of an accused person to be informed of the nature of the accusation against him, and his right to be tried by an impartial jury of the vicinage; and also the right to be secure against excessive bail and against cruel and unusual punishments.

"Now, sir, here is a mass of privileges, immunities, and rights, some of them secured by the second section of the fourth article of the Constitution, which I have recited, some by the first eight amendments of the Constitution; and it is a fact well worthy of attention that the course of decision of our courts and the present settled doctrine is, that all these immunities, privileges, rights, thus guarantied by the Constitution or recognized by it, are secured to the citizens solely as a citizen of the United States and as a party in their courts. They do not operate in the slightest degree as a restraint or prohibition upon State legislation. . . .

". . . The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees." Cong. Globe, 39th Cong., 1st Sess., 2765–2766 (1866).

From this I conclude, contrary to my Brother HARLAN, that if anything, it is "exceedingly peculiar" to read the Fourteenth Amendment differently from the way I do.

While I do not wish at this time to discuss at length my disagreement with Brother HARLAN's forthright and frank restatement of the now discredited *Twining* doc-

trine,[2] I do want to point out what appears to me to be the basic difference between us. His view, as was indeed the view of *Twining*, is that "due process is an evolving concept" and therefore that it entails a "gradual process of judicial inclusion and exclusion" to ascertain those "immutable principles . . . of free government which no member of the Union may disregard." Thus the Due Process Clause is treated as prescribing no specific and clearly ascertainable constitutional command that judges must obey in interpreting the Constitution, but rather as leaving judges free to decide at any particular time whether a particular rule or judicial formulation embodies an "immutable principl[e] of free government" or is "implicit in the concept of ordered liberty," or whether certain conduct "shocks the judge's conscience" or runs counter to some other similar, undefined and undefinable standard. Thus due process, according to my Brother HARLAN, is to be a phrase with no permanent meaning, but one which is found to shift from time to time in accordance with judges' predilections and understandings of what is best for the country. If due process means this, the Fourteenth Amendment, in my opinion, might as well have been written that "no person shall be deprived of life, liberty or property except by laws that the judges of the United States Supreme Court shall find to be consistent with the immutable principles of free government." It is impossible for me to believe that such unconfined power is given to judges in our Constitution that is a written one in order to limit governmental power.

Another tenet of the *Twining* doctrine as restated by my Brother HARLAN is that "due process of law requires only fundamental fairness." But the "fundamental

[2] For a more thorough exposition of my views against this approach to the Due Process Clause, see my concurring opinion in *Rochin* v. *California*, 342 U. S. 165, 174.

fairness" test is one on a par with that of shocking the conscience of the Court. Each of such tests depends entirely on the particular judge's idea of ethics and morals instead of requiring him to depend on the boundaries fixed by the written words of the Constitution. Nothing in the history of the phrase "due process of law" suggests that constitutional controls are to depend on any particular judge's sense of values. The origin of the Due Process Clause is Chapter 39 of Magna Carta which declares that "No free man shall be taken, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the *law of the land*."[3] (Emphasis added.) As early as 1354 the words "due process of law" were used in an English statute interpreting Magna Carta,[4] and by the end of the 14th century "due process of law" and "law of the land" were interchangeable. Thus the origin of this clause was an attempt by those who wrote Magna Carta to do away with the so-called trials of that period where people were liable to sudden arrest and summary conviction in courts and by judicial commissions with no sure and definite procedural protections and under laws that might have been improvised to try their particular cases. Chapter 39 of Magna Carta was a guarantee that the government would take neither life, liberty, nor property without a trial in accord with the law of the land that already existed at the time the alleged offense was committed. This means that the Due Process Clause gives all Americans, whoever they are and wherever they happen to be, the right to be tried by independent and unprejudiced courts using established procedures and applying valid pre-existing laws. There is not one word of legal history that justifies making the

[3] See *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How. 272, 276.

[4] 28 Edw. 3, c. 3 (1354).

term "due process of law" mean a guarantee of a trial free from laws and conduct which the courts deem at the time to be "arbitrary," "unreasonable," "unfair," or "contrary to civilized standards." The due process of law standard for a trial is one in accordance with the Bill of Rights and laws passed pursuant to constitutional power, guaranteeing to all alike a trial under the general law of the land.

Finally I want to add that I am not bothered by the argument that applying the Bill of Rights to the States, "according to the same standards that protect those personal rights against federal encroachment," [5] interferes with our concept of federalism in that it may prevent States from trying novel social and economic experiments. I have never believed that under the guise of federalism the States should be able to experiment with the protections afforded our citizens through the Bill of Rights. As Justice Goldberg said so wisely in his concurring opinion in *Pointer* v. *Texas*, 380 U. S. 400:

> "to deny to the States the power to impair a fundamental constitutional right is not to increase federal power, but, rather, to limit the power of both federal and state governments in favor of safeguarding the fundamental rights and liberties of the individual. In my view this promotes rather than undermines the basic policy of avoiding excess concentration of power in government, federal or state, which underlies our concepts of federalism." 380 U. S., at 414.

It seems to me totally inconsistent to advocate, on the one hand, the power of this Court to strike down any state law or practice which it finds "unreasonable" or "unfair" and, on the other hand, urge that the States be

[5] See *Malloy* v. *Hogan*, 378 U. S. 1, 10; *Pointer* v. *Texas*, 380 U. S. 400, 406; *Miranda* v. *Arizona*, 384 U. S. 436, 464.

given maximum power to develop their own laws and procedures. Yet the due process approach of my Brothers HARLAN and FORTAS (see other concurring opinion, *post*, p. 211) does just that since in effect it restricts the States to practices which a majority of this Court is willing to approve on a case-by-case basis. No one is more concerned than I that the States be allowed to use the full scope of their powers as their citizens see fit. And that is why I have continually fought against the expansion of this Court's authority over the States through the use of a broad, general interpretation of due process that permits judges to strike down state laws they do not like.

In closing I want to emphasize that I believe as strongly as ever that the Fourteenth Amendment was intended to make the Bill of Rights applicable to the States. I have been willing to support the selective incorporation doctrine, however, as an alternative, although perhaps less historically supportable than complete incorporation. The selective incorporation process, if used properly, does limit the Supreme Court in the Fourteenth Amendment field to specific Bill of Rights' protections only and keeps judges from roaming at will in their own notions of what policies outside the Bill of Rights are desirable and what are not. And, most importantly for me, the selective incorporation process has the virtue of having already worked to make most of the Bill of Rights' protections applicable to the States.

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, dissenting.

Every American jurisdiction provides for trial by jury in criminal cases. The question before us is not whether jury trial is an ancient institution, which it is; nor whether it plays a significant role in the administration

of criminal justice, which it does; nor whether it will endure, which it shall. The question in this case is whether the State of Louisiana, which provides trial by jury for all felonies, is prohibited by the Constitution from trying charges of simple battery to the court alone. In my view, the answer to that question, mandated alike by our constitutional history and by the longer history of trial by jury, is clearly "no."

The States have always borne primary responsibility for operating the machinery of criminal justice within their borders, and adapting it to their particular circumstances. In exercising this responsibility, each State is compelled to conform its procedures to the requirements of the Federal Constitution. The Due Process Clause of the Fourteenth Amendment requires that those procedures be fundamentally fair in all respects. It does not, in my view, impose or encourage nationwide uniformity for its own sake; it does not command adherence to forms that happen to be old; and it does not impose on the States the rules that may be in force in the federal courts except where such rules are also found to be essential to basic fairness.

The Court's approach to this case is an uneasy and illogical compromise among the views of various Justices on how the Due Process Clause should be interpreted. The Court does not say that those who framed the Fourteenth Amendment intended to make the Sixth Amendment applicable to the States. And the Court concedes that it finds nothing unfair about the procedure by which the present appellant was tried. Nevertheless, the Court reverses his conviction: it holds, for some reason not apparent to me, that the Due Process Clause incorporates the particular clause of the Sixth Amendment that requires trial by jury in federal criminal cases—including, as I read its opinion, the sometimes trivial accompanying baggage of judicial interpretation in federal contexts.

I have raised my voice many times before against the Court's continuing undiscriminating insistence upon fastening on the States federal notions of criminal justice,[1] and I must do so again in this instance. With all respect, the Court's approach and its reading of history are altogether topsy-turvy.

I.

I believe I am correct in saying that every member of the Court for at least the last 135 years has agreed that our Founders did not consider the requirements of the Bill of Rights so fundamental that they should operate directly against the States.[2] They were wont to believe rather that the security of liberty in America rested primarily upon the dispersion of governmental power across a federal system.[3] The Bill of Rights was considered unnecessary by some[4] but insisted upon by others in order to curb the possibility of abuse of power by the strong central government they were creating.[5]

The Civil War Amendments dramatically altered the relation of the Federal Government to the States. The first section of the Fourteenth Amendment imposes

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[1] See, *e. g.*, my opinions in *Mapp* v. *Ohio*, 367 U. S. 643, 672 (dissenting); *Ker* v. *California*, 374 U. S. 23, 44 (concurring); *Malloy* v. *Hogan*, 378 U. S. 1, 14 (dissenting); *Pointer* v. *Texas*, 380 U. S. 400, 408 (concurring); *Griffin* v. *California*, 380 U. S. 609, 615 (concurring); *Klopfer* v. *North Carolina*, 386 U. S. 213, 226 (concurring).

[2] *Barron* v. *Baltimore*, 7 Pet. 243 (1833), held that the first eight Amendments restricted only federal action.

[3] The *locus classicus* for this viewpoint is The Federalist No. 51 (Madison).

[4] The Bill of Rights was opposed by Hamilton and other proponents of a strong central government. See The Federalist No. 84; see generally C. Rossiter, 1787: The Grand Convention 284, 302–303.

[5] In *Barron* v. *Baltimore*, *supra*, at 250, Chief Justice Marshall said, "These amendments demanded security against the apprehended encroachments of the general government—not against those of the local governments."

highly significant restrictions on state action. But the restrictions are couched in very broad and general terms: citizenship; privileges and immunities; due process of law; equal protection of the laws. Consequently, for 100 years this Court has been engaged in the difficult process Professor Jaffe has well called "the search for intermediate premises." [6] The question has been, Where does the Court properly look to find the specific rules that define and give content to such terms as "life, liberty, or property" and "due process of law"?

A few members of the Court have taken the position that the intention of those who drafted the first section of the Fourteenth Amendment was simply, and exclusively, to make the provisions of the first eight Amendments applicable to state action.[7] This view has never been accepted by this Court. In my view, often expressed elsewhere,[8] the first section of the Fourteenth Amendment was meant neither to incorporate, nor to be limited to, the specific guarantees of the first eight Amendments. The overwhelming historical evidence marshalled by Professor Fairman demonstrates, to me conclusively, that the Congressmen and state legislators who wrote, debated, and ratified the Fourteenth Amendment did not think they were "incorporating" the Bill of Rights [9] and

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[6] Jaffe, Was Brandeis an Activist? The Search for Intermediate Premises, 80 Harv. L. Rev. 986 (1967).

[7] See *Adamson* v. *California*, 332 U. S. 46, 71 (dissenting opinion of BLACK, J.); *O'Neil* v. *Vermont*, 144 U. S. 323, 366, 370 (dissenting opinion of Harlan, J.) (1892); H. Black, "Due Process of Law," in A Constitutional Faith 23 (1968).

[8] In addition to the opinions cited in n. 1, *supra*, see, *e. g.*, my opinions in *Poe* v. *Ullman*, 367 U. S. 497, 522, at 539–545 (dissenting), and *Griswold* v. *Connecticut*, 381 U. S. 479, 499 (concurring).

[9] Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding, 2 Stan. L. Rev. 5 (1949). Professor Fairman was not content to rest upon the overwhelming

the very breadth and generality of the Amendment's provisions suggest that its authors did not suppose that the Nation would always be limited to mid-19th century conceptions of "liberty" and "due process of law" but that the increasing experience and evolving conscience of the American people would add new "intermediate premises." In short, neither history, nor sense, supports using the Fourteenth Amendment to put the States in a

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fact that the great words of the four clauses of the first section of the Fourteenth Amendment would have been an exceedingly peculiar way to say that "The rights heretofore guaranteed against federal intrusion by the first eight Amendments are henceforth guaranteed against state intrusion as well." He therefore sifted the mountain of material comprising the debates and committee reports relating to the Amendment in both Houses of Congress and in the state legislatures that passed upon it. He found that in the immense corpus of comments on the purpose and effects of the proposed amendment, and on its virtues and defects, there is almost no evidence whatever for "incorporation." The first eight Amendments are so much as mentioned by only two members of Congress, one of whom effectively demonstrated (a) that he did not understand *Barron* v. *Baltimore*, 7 Pet. 243, and therefore did not understand the question of incorporation, and (b) that he was not himself understood by his colleagues. One state legislative committee report, rejected by the legislature as a whole, found § 1 of the Fourteenth Amendment superfluous because it duplicated the Bill of Rights: the committee obviously did not understand *Barron* v. *Baltimore* either. That is all Professor Fairman could find, in hundreds of pages of legislative discussion prior to passage of the Amendment, that even suggests incorporation.

To this negative evidence the judicial history of the Amendment could be added. For example, it proved possible for a Court whose members had lived through Reconstruction to reiterate the doctrine of *Barron* v. *Baltimore*, that the Bill of Rights did not apply to the States, without so much as questioning whether the Fourteenth Amendment had any effect on the continued validity of that principle. *E. g.*, *Walker* v. *Sauvinet*, 92 U. S. 90; see generally Morrison, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Judicial Interpretation, 2 Stan. L. Rev. 140 (1949).

constitutional straitjacket with respect to their own development in the administration of criminal or civil law.

Although I therefore fundamentally disagree with the total incorporation view of the Fourteenth Amendment, it seems to me that such a position does at least have the virtue, lacking in the Court's selective incorporation approach, of internal consistency: we look to the Bill of Rights, word for word, clause for clause, precedent for precedent because, it is said, the men who wrote the Amendment wanted it that way. For those who do not accept this "history," a different source of "intermediate premises" must be found. The Bill of Rights is not necessarily irrelevant to the search for guidance in interpreting the Fourteenth Amendment, but the reason for and the nature of its relevance must be articulated.

Apart from the approach taken by the absolute incorporationists, I can see only one method of analysis that has any internal logic. That is to start with the words "liberty" and "due process of law" and attempt to define them in a way that accords with American traditions and our system of government. This approach, involving a much more discriminating process of adjudication than does "incorporation," is, albeit difficult, the one that was followed throughout the 19th and most of the present century. It entails a "gradual process of judicial inclusion and exclusion," [10] seeking, with due recognition of constitutional tolerance for state experimentation and disparity, to ascertain those "immutable principles . . . of free government which no member of the Union may disregard." [11] Due process was not restricted to rules fixed in the past, for that "would be to deny every quality

[10] *Davidson* v. *New Orleans*, 96 U. S. 97, 104.

[11] *Holden* v. *Hardy*, 169 U. S. 366, 389.

of the law but its age, and to render it incapable of progress or improvement." [12] Nor did it impose nationwide uniformity in details, for

> "[t]he Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each State prescribes its own modes of judicial proceeding." [13]

Through this gradual process, this Court sought to define "liberty" by isolating freedoms that Americans of the past and of the present considered more important than any suggested countervailing public objective. The Court also, by interpretation of the phrase "due process of law," enforced the Constitution's guarantee that no State may imprison an individual except by fair and impartial procedures.

The relationship of the Bill of Rights to this "gradual process" seems to me to be twofold. In the first place it has long been clear that the Due Process Clause imposes some restrictions on state action that parallel Bill of Rights restrictions on federal action. Second, and more important than this accidental overlap, is the fact that the Bill of Rights is evidence, at various points, of the content Americans find in the term "liberty" and of American standards of fundamental fairness.

An example, both of the phenomenon of parallelism and the use of the first eight Amendments as evidence of a historic commitment, is found in the partial definition

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[12] *Hurtado* v. *California*, 110 U. S. 516, 529.

[13] *Missouri* v. *Lewis*, 101 U. S. 22, 31.

of "liberty" offered by Mr. Justice Holmes, dissenting in *Gitlow* v. *New York*, 268 U. S. 652:

> "The general principle of free speech . . . must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word 'liberty' as there used, although perhaps it may be accepted with a somewhat larger latitude of interpretation than is allowed to Congress by the sweeping language that governs or ought to govern the laws of the United States." *Id.*, at 672.

As another example, Mr. Justice Frankfurter, speaking for the Court in *Wolf* v. *Colorado*, 338 U. S. 25, 27–28, recognized that

> "[t]he security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause."

The Court has also found among the procedural requirements of "due process of law" certain rules paralleling requirements of the first eight Amendments. For example, in *Powell* v. *Alabama*, 287 U. S. 45, the Court ruled that a State could not deny counsel to an accused in a capital case:

> "The fact that the right involved is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' . . . is obviously one of those compelling considerations which must prevail in determining whether it is embraced within the due process clause of the Fourteenth Amendment, *although* it be specifically dealt with in another part of the federal Constitution." *Id.*, at 67. (Emphasis added.)

Later, the right to counsel was extended to all felony cases.[14] The Court has also ruled, for example, that "due process" means a speedy process, so that liberty will not be long restricted prior to an adjudication, and evidence of fact will not become stale; [15] that in a system committed to the resolution of issues of fact by adversary proceedings the right to confront opposing witnesses must be guaranteed; [16] and that if issues of fact are tried to a jury, fairness demands a jury impartially selected.[17] That these requirements are fundamental to procedural fairness hardly needs redemonstration.

In all of these instances, the right guaranteed against the States by the Fourteenth Amendment was one that had also been guaranteed against the Federal Government by one of the first eight Amendments. The logically critical thing, however, was not that the rights had been found in the Bill of Rights, but that they were deemed, in the context of American legal history, to be fundamental. This was perhaps best explained by Mr. Justice Cardozo, speaking for a Court that included Chief Justice Hughes and Justices Brandeis and Stone, in *Palko* v. *Connecticut,* 302 U. S. 319:

> "If the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed." *Id.,* at 326.

Referring to *Powell* v. *Alabama, supra,* Mr. Justice Cardozo continued:

> "The decision did not turn upon the fact that the benefit of counsel would have been guaranteed to

[14] *Gideon* v. *Wainwright,* 372 U. S. 335. The right to counsel was found in the Fourteenth Amendment because, the Court held, it *was* essential to a fair trial. See 372 U. S., at 342–345.

[15] *Klopfer* v. *North Carolina,* 386 U. S. 213.

[16] *Pointer* v. *Texas,* 380 U. S. 400.

[17] *Irvin* v. *Dowd,* 366 U. S. 717.

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> the defendants by the provisions of the Sixth Amendment if they had been prosecuted in a federal court. The decision turned upon the fact that in the particular situation laid before us in the evidence the benefit of counsel was essential to the substance of a hearing." *Id.*, at 327.

Mr. Justice Cardozo then went on to explain that the Fourteenth Amendment did not impose on each State every rule of procedure that some other State, or the federal courts, thought desirable, but only those rules critical to liberty:

> "The line of division may seem to be wavering and broken if there is a hasty catalogue of the cases on the one side and the other. Reflection and analysis will induce a different view. There emerges the perception of a rationalizing principle which gives to discrete instances a proper order and coherence. The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty. To abolish them is not to violate a 'principle of justice so rooted in the traditions and conscience of *our people* as to be ranked as fundamental.' . . . Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them." *Id.*, at 325. (Emphasis added.)

Today's Court still remains unwilling to accept the total incorporationists' view of the history of the Fourteenth Amendment. This, if accepted, would afford a cogent reason for applying the Sixth Amendment to the States. The Court is also, apparently, unwilling to face the task of determining whether denial of trial by jury in the situation before us, or in other situations, is fun-

damentally unfair. Consequently, the Court has compromised on the ease of the incorporationist position, without its internal logic. It has simply assumed that the question before us is whether the Jury Trial Clause of the Sixth Amendment should be incorporated into the Fourteenth, jot-for-jot and case-for-case, or ignored. Then the Court merely declares that the clause in question is "in" rather than "out." [18]

The Court has justified neither its starting place nor its conclusion. If the problem is to discover and articulate the rules of fundamental fairness in criminal proceedings, there is no reason to assume that the whole body of rules developed in this Court constituting Sixth Amendment jury trial must be regarded as a unit. The requirement of trial by jury in federal criminal cases has given rise to numerous subsidiary questions respecting the exact scope and content of the right. It surely cannot be that every answer the Court has given, or will give, to such a question is attributable to the Founders; or even that every rule announced carries equal conviction of this Court; still less can it be that every such subprinciple is equally fundamental to ordered liberty.

Examples abound. I should suppose it obviously fundamental to fairness that a "jury" means an "impartial

[18] The same illogical way of dealing with a Fourteenth Amendment problem was employed in *Malloy* v. *Hogan*, 378 U. S. 1, which held that the Due Process Clause guaranteed the protection of the Self-Incrimination Clause of the Fifth Amendment against state action. I disagreed at that time both with the way the question was framed and with the result the Court reached. See my dissenting opinion, *id.*, at 14. I consider myself bound by the Court's holding in *Malloy* with respect to self-incrimination. See my concurring opinion in *Griffin* v. *California*, 380 U. S. 609, 615. I do not think that *Malloy* held, nor would I consider myself bound by a holding, that every question arising under the Due Process Clause shall be settled by an arbitrary decision whether a clause in the Bill of Rights is "in" or "out."

jury." [19] I should think it equally obvious that the rule, imposed long ago in the federal courts, that "jury" means "jury of exactly twelve," [20] is not fundamental to anything: there is no significance except to mystics in the number 12. Again, trial by jury has been held to require a unanimous verdict of jurors in the federal courts,[21] although unanimity has not been found essential to liberty in Britain, where the requirement has been abandoned.[22]

One further example is directly relevant here. The co-existence of a requirement of jury trial in federal criminal cases and a historic and universally recognized exception for "petty crimes" has compelled this Court, on occasion, to decide whether a particular crime is petty, or is included within the guarantee.[23] Individual cases have been decided without great conviction and without reference to a guiding principle. The Court today holds, for no discernible reason, that if and when the line is drawn its exact location will be a matter of such fundamental importance that it will be uniformly imposed on the States. This Court is compelled to decide such

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[19] The Court has so held in, *e. g., Irvin* v. *Dowd,* 366 U. S. 717. Compare *Dennis* v. *United States,* 339 U. S. 162.

[20] *E. g., Rassmussen* v. *United States,* 197 U. S. 516.

[21] *E. g., Andres* v. *United States,* 333 U. S. 740. With respect to the common-law number and unanimity requirements, the Court suggests that these present no problem because "our decisions interpreting the Sixth Amendment are always subject to reconsideration . . . ." *Ante,* at 158, n. 30. These examples illustrate a major danger of the "incorporation" approach—that provisions of the Bill of Rights may be watered down in the needless pursuit of uniformity. Cf. my concurring opinion in *Ker* v. *California,* 374 U. S. 23, 44. MR. JUSTICE WHITE alluded to this problem in his dissenting opinion in *Malloy* v. *Hogan, supra,* at 38.

[22] Criminal Justice Act of 1967, § 13.

[23] *E. g., Callan* v. *Wilson,* 127 U. S. 540; *District of Columbia* v. *Clawans,* 300 U. S. 617; *District of Columbia* v. *Colts,* 282 U. S. 63.

obscure borderline questions in the course of administering federal law. This does not mean that its decisions are demonstrably sounder than those that would be reached by state courts and legislatures, let alone that they are of such importance that fairness demands their imposition throughout the Nation.

Even if I could agree that the question before us is whether Sixth Amendment jury trial is totally "in" or totally "out," I can find in the Court's opinion no real reasons for concluding that it should be "in." The basis for differentiating among clauses in the Bill of Rights cannot be that only some clauses are in the Bill of Rights, or that only some are old and much praised, or that only some have played an important role in the development of federal law. These things are true of all. The Court says that some clauses are more "fundamental" than others, but it turns out to be using this word in a sense that would have astonished Mr. Justice Cardozo and which, in addition, is of no help. The word does not mean "analytically critical to procedural fairness" for no real analysis of the role of the jury in making procedures fair is even attempted. Instead, the word turns out to mean "old," "much praised," and "found in the Bill of Rights." The definition of "fundamental" thus turns out to be circular.

II.

Since, as I see it, the Court has not even come to grips with the issues in this case, it is necessary to start from the beginning. When a criminal defendant contends that his state conviction lacked "due process of law," the question before this Court, in my view, is whether he was denied any element of fundamental procedural fairness. Believing, as I do, that due process is an evolving concept and that old principles are subject to re-evaluation in light of later experience, I think it appropriate to deal on its merits with the question whether Louisiana denied

appellant due process of law when it tried him for simple assault without a jury.

The obvious starting place is the fact that this Court has, in the past, *held* that trial by jury is not a requisite of criminal due process. In the leading case, *Maxwell* v. *Dow*, 176 U. S. 581, Mr. Justice Peckham wrote as follows for the Court: [24]

> "Trial by jury has never been affirmed to be a necessary requisite of due process of law. . . .
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> . . . . . .
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> ". . . The right to be proceeded against only by indictment, and the right to a trial by twelve jurors, are of the same nature, and are subject to the same judgment, and the people in the several States have the same right to provide by their organic law for the change of both or either. . . . [T]he State has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution. The legislation in question is not, in our opinion, open to either of these objections." *Id.*, at 603–605.

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[24] The precise issue in *Maxwell* was whether a jury of eight rather than 12 jurors could be employed in criminal prosecutions in Utah. The Court held that this was permissible because the Fourteenth Amendment did not require the States to provide trial by jury at all. The Court seems to think this was dictum. As a technical matter, however, a statement that is critical to the chain of reasoning by which a result is in fact reached does not become dictum simply because a later court can imagine a totally different way of deciding the case. See *Jordan* v. *Massachusetts*, 225 U. S. 167, 176, citing *Maxwell* for the proposition that "the requirement of due process does not deprive a State of the power to dispense with jury trial altogether."

In *Hawaii* v. *Mankichi*, 190 U. S. 197, the question was whether the Territory of Hawaii could continue its pre-annexation procedure of permitting conviction by non-unanimous juries. The Congressional Resolution of Annexation had provided that municipal legislation of Hawaii that was not contrary to the United States Constitution could remain in force. The Court interpreted the resolution to mean only that those requirements of the Constitution that were "fundamental" would be binding in the Territory. After concluding that a municipal statute allowing a conviction of treason on circumstantial evidence *would* violate a "fundamental" guarantee of the Constitution, the Court continued:

> "We would even go farther, and say that most, if not all, the privileges and immunities contained in the bill of rights of the Constitution were intended to apply from the moment of annexation; but we place our decision of this case upon the ground that the two rights alleged to be violated in this case [Sixth Amendment jury trial and grand jury indictment] are not fundamental in their nature, but concern merely a method of procedure which sixty years of practice had shown to be suited to the conditions of the islands, and well calculated to conserve the rights of their citizens to their lives, their property and their well-being." *Id.*, at 217–218.

Numerous other cases in this Court have assumed that jury trial is not fundamental to ordered liberty.[25]

Although it is of course open to this Court to re-examine these decisions, I can see no reason why they

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[25] *E. g.*, *Irvin* v. *Dowd*, *supra*, at 721; *Fay* v. *New York*, 332 U. S. 261, 288; *Palko* v. *Connecticut*, *supra*, at 325; *Snyder* v. *Massachusetts*, 291 U. S. 97, 105; *Brown* v. *New Jersey*, 175 U. S. 172, 175; *Missouri* v. *Lewis*, *supra*, at 31.

should now be overturned. It can hardly be said that time has altered the question, or brought significant new evidence to bear upon it. The virtues and defects of the jury system have been hotly debated for a long time,[26] and are hotly debated today, without significant change in the lines of argument.[27]

The argument that jury trial is not a requisite of due process is quite simple. The central proposition of *Palko, supra,* a proposition to which I would adhere, is that "due process of law" requires only that criminal trials be fundamentally fair. As stated above, apart from the theory that it was historically intended as a mere shorthand for the Bill of Rights, I do not see what else "due process of law" can intelligibly be thought to mean. If due process of law requires only fundamental

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[26] *E. g.,* Deady, Trial by Jury, 17 Am. L. Rev. 398, 399–400 (1883):

"Still in these days of progress and experiment, when everything is on trial at the bar of human reason or conceit, it is quite the fashion to speak of jury trial as something that has outlived its usefulness. Intelligent and well-meaning people often sneer at it as an awkward and useless impediment to the speedy and correct administration of justice, and a convenient loop-hole for the escape of powerful and popular rogues. Considering the kind of jury trials we sometimes have in the United States, it must be admitted that this criticism is not without foundation."

[27] See generally Kalven, Memorandum Regarding Jury System, printed in Hearings on Recording of Jury Deliberations before the Subcommittee to Investigate the Administration of the Internal Security Act of the Senate Committee on the Judiciary, 84th Cong., 1st Sess., 63–81. In particular,

"the debate has been going on for a long time (at least since 1780) and the arguments which were advanced pro and con haven't changed much in the interim. Nor, contrary to my first impression, does there seem to be any particular period in which the debate grows hotter or colder. It has always been a hot debate." *Id.,* at 63.

fairness,[28] then the inquiry in each case must be whether a state trial process was a fair one. The Court has held, properly I think, that in an adversary process it is a requisite of fairness, for which there is no adequate substitute, that a criminal defendant be afforded a right to counsel and to cross-examine opposing witnesses. But it simply has not been demonstrated, nor, I think, can it be demonstrated, that trial by jury is the only fair means of resolving issues of fact.

The jury is of course not without virtues. It affords ordinary citizens a valuable opportunity to participate in a process of government, an experience fostering, one hopes, a respect for law.[29] It eases the burden on judges by enabling them to share a part of their sometimes awesome responsibility.[30] A jury may, at times, afford a higher justice by refusing to enforce harsh laws (although it necessarily does so haphazardly, raising the questions whether arbitrary enforcement of harsh laws is better than total enforcement, and whether the jury system is to be defended on the ground that jurors sometimes disobey their oaths).[31] And the jury may, or may

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[28] See, *e. g.*, *Snyder* v. *Massachusetts*, *supra*, at 107–108 (Cardozo, J.):

"So far as the Fourteenth Amendment is concerned, the presence of a defendant [at trial] is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only."

[29] The point is made by, among others, A. Tocqueville. 1 Democracy in America 285 (Reeve tr.).

[30] The argument is developed by Curtis, The Trial Judge and the Jury, 5 Vand. L. Rev. 150 (1952). For example,

"Juries relieve the judge of the embarrassment of making the necessary exceptions. They do this, it is true, by violating their oaths, but this, I think, is better than tempting the judge to violate his oath of office." *Id.*, at 157.

[31] See generally G. Williams, The Proof of Guilt 257–263; W. Forsyth, History of Trial by Jury 261.

not, contribute desirably to the willingness of the general public to accept criminal judgments as just.[32]

It can hardly be gainsaid, however, that the principal original virtue of the jury trial—the limitations a jury imposes on a tyrannous judiciary—has largely disappeared. We no longer live in a medieval or colonial society. Judges enforce laws enacted by democratic decision, not by regal fiat. They are elected by the people or appointed by the people's elected officials, and are responsible not to a distant monarch alone but to reviewing courts, including this one.[33]

The jury system can also be said to have some inherent defects, which are multiplied by the emergence of the criminal law from the relative simplicity that existed when the jury system was devised.[34] It is a cumbersome process, not only imposing great cost in time and money on both the State and the jurors themselves,[35] but also contributing to delay in the machinery of justice.[36] Untrained jurors are presumably less adept at reaching accurate conclusions of fact than judges,

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[32] See J. Stephen, A General View of the Criminal Law of England 208–209.

[33] See, *e. g.*, Sunderland, The Inefficiency of the American Jury, 13 Mich. L. Rev. 302, 305:

"But times have changed, and the government itself is now under the absolute control of the people. The judges, if appointed, are selected by the agents of the people, and if elected are selected by the people directly. The need for the jury as a political weapon of defense has been steadily diminishing for a hundred years, until now the jury must find some other justification for its continuance."

[34] See, *e. g.*, Sunderland, *supra*, at 303:

"Life was simple when the jury system was young, but with the steadily growing complexity of society and social practices, the facts which enter into legal controversies have become much more complex."

[35] Compare Green, Jury Injustice, 20 Jurid. Rev. 132, 133.

[36] Cf. Lummus, Civil Juries and the Law's Delay, 12 B. U. L. Rev. 487.

particularly if the issues are many or complex.[37] And it is argued by some that trial by jury, far from increasing public respect for law, impairs it: the average man, it is said, reacts favorably neither to the notion that matters he knows to be complex are being decided by other average men,[38] nor to the way the jury system distorts the process of adjudication.[39]

That trial by jury is not the only fair way of adjudicating criminal guilt is well attested by the fact that it is not the prevailing way, either in England or in this country. For England, one expert makes the following estimates. Parliament generally provides that new statutory offenses, unless they are of "considerable gravity" shall be tried to judges; consequently, summary offenses now outnumber offenses for which jury trial is afforded by more than six to one. Then, within the latter category, 84% of all cases are in fact tried to the court. Over all, "the ratio of defendants actually tried by jury becomes in some years little more than 1 per cent." [40]

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[37] See, *e. g.*, McWhorter, Abolish the Jury, 57 Am. L. Rev. 42. Statistics on this point are difficult to accumulate for the reason that the only way to measure jury performance is to compare the result reached by a jury with the result the judge would have reached in the same case. While judge-jury comparisons have many values, it is impossible to obtain a statistical comparison of accuracy in this manner. See generally H. Kalven & H. Zeisel, The American Jury, *passim*.

[38] *E. g.*, Boston, Some Practical Remedies for Existing Defects in the Administration of Justice, 61 U. Pa. L. Rev. 1, 16:

"There is not one important personal or property interest, outside of a Court of justice, which any of us would willingly commit to the first twelve men that come along the street . . . ."

[39] *E. g.*, McWhorter, *supra*, at 46:

"It is the jury system that consumes time at the public expense in gallery playing and sensational and theatrical exhibitions before the jury, whereby the public interest and the dignity of the law are swallowed up in a morbid, partisan or emotional personal interest in the parties immediately concerned."

[40] Williams, *supra*, at 302.

In the United States, where it has not been as generally assumed that jury waiver is permissible,[41] the statistics are only slightly less revealing. Two experts have estimated that, of all prosecutions for crimes triable to a jury, 75% are settled by guilty plea and 40% of the remainder are tried to the court.[42] In one State, Maryland, which has always provided for waiver, the rate of court trial appears in some years to have reached 90%.[43] The Court recognizes the force of these statistics in stating,

> "We would not assert, however, that every criminal trial—or any particular trial—held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury." *Ante*, at 158.

I agree. I therefore see no reason why this Court should reverse the conviction of appellant, absent any suggestion that his particular trial was in fact unfair, or compel the State of Louisiana to afford jury trial in an as yet unbounded category of cases that can, without unfairness, be tried to a court.

Indeed, even if I were persuaded that trial by jury is a fundamental right in some criminal cases, I could see nothing fundamental in the rule, not yet formulated by the Court, that places the prosecution of appellant for simple battery within the category of "jury crimes" rather than "petty crimes." Trial by jury is ancient,

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[41] For example, in the federal courts the right of the defendant to waive a jury was in doubt as recently as 1930, when it was established in *Patton* v. *United States*, 281 U. S. 276. It was settled in New York only in 1957, *People* v. *Carroll*, 7 Misc. 2d 581, 161 N. Y. S. 2d 339, aff'd, 3 N. Y. 2d 686, 148 N. E. 2d 875.

[42] Kalven & Zeisel, *supra*, at 12–32.

[43] See Oppenheim, Waiver of Trial by Jury in Criminal Cases, 25 Mich. L. Rev. 695, 728.

it is true. Almost equally ancient, however, is the discovery that, because of it,

> "the King's most loving Subjects are much travailed and otherwise encumbered in coming and keeping of the said six Weeks Sessions, to their Costs, Charges, Unquietness." [44]

As a result, through the long course of British and American history, summary procedures have been used in a varying category of lesser crimes as a flexible response to the burden jury trial would otherwise impose.

The use of summary procedures has long been widespread. British procedure in 1776 exempted from the requirement of jury trial

> "[v]iolations of the laws relating to liquor, trade and manufacture, labor, smuggling, traffic on the highway, the Sabbath, 'cheats,' gambling, swearing, small thefts, *assaults*, offenses to property, servants and seamen, vagabondage . . . [and] at least a hundred more . . . ." [45] (Emphasis added.)

Penalties for such offenses included heavy fines (with imprisonment until they were paid), whippings, and imprisonment at hard labor.[46]

Nor had the Colonies a cleaner slate, although practices varied greatly from place to place with conditions. In Massachusetts, crimes punishable by whipping (up to 10 strokes), the stocks (up to three hours), the ducking stool, and fines and imprisonment were triable to magistrates.[47] The decision of a magistrate could, in theory,

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[44] 37 Hen. 8, c. 7.

[45] Frankfurter & Corcoran, Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury, 39 Harv. L. Rev. 917, 928. The source of the authors' information is R. Burn, Justice of the Peace (1776).

[46] Frankfurter & Corcoran, *supra*, at 930–934.

[47] See, *id.*, at 938–942.

be appealed to a jury, but a stiff recognizance made exercise of this right quite rare.[48] New York was somewhat harsher. For example, "anyone adjudged by two magistrates to be an idle, disorderly or vagrant person might be transported whence he came, and on reappearance be whipped from constable to constable with thirty-one lashes by each."[49] Anyone committing a criminal offense "under the degree of Grand Larceny" and unable to furnish bail within 48 hours could be summarily tried by three justices.[50] With local variations, examples could be multiplied.

The point is not that many offenses that English-speaking communities have, at one time or another, regarded as triable without a jury are more serious, and carry more serious penalties, than the one involved here. The point is rather that until today few people would have thought the exact location of the line mattered very much. There is no obvious reason why a jury trial is a requisite of fundamental fairness when the charge is robbery, and not a requisite of fairness when the same defendant, for the same actions, is charged with assault and petty theft.[51] The reason for the historic exception for relatively minor crimes is the obvious one: the burden of jury trial was thought to outweigh its marginal advantages. Exactly why the States should not be allowed to make continuing adjustments, based on the state of

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[48] *Ibid.*

[49] Frankfurter & Corcoran, *supra*, at 945. They refer to the Vagrancy Act of 1721, 2 Col. L. (N. Y.) 56.

[50] Frankfurter & Corcoran, *supra*, at 945.

[51] The example is taken from Day, Petty Magistrates' Courts in Connecticut, 17 J. Crim. L. C. & P. S., 343, 346–347, cited in Kalven & Zeisel, *supra*, at 17. The point is that the "huge proportion" of criminal charges for which jury trial has not been available in America, E. Puttkammer, Administration of Criminal Law 87–88, is increased by the judicious action of weary prosecutors.

their criminal dockets and the difficulty of summoning jurors, simply escapes me.

In sum, there is a wide range of views on the desirability of trial by jury, and on the ways to make it most effective when it is used; there is also considerable variation from State to State in local conditions such as the size of the criminal caseload, the ease or difficulty of summoning jurors, and other trial conditions bearing on fairness. We have before us, therefore, an almost perfect example of a situation in which the celebrated dictum of Mr. Justice Brandeis should be invoked. It is, he said,

> "one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory . . . ." *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 280, 311 (dissenting opinion).

This Court, other courts, and the political process are available to correct any experiments in criminal procedure that prove fundamentally unfair to defendants. That is not what is being done today: instead, and quite without reason, the Court has chosen to impose upon every State one means of trying criminal cases; it is a good means, but it is not the only fair means, and it is not demonstrably better than the alternatives States might devise.

I would affirm the judgment of the Supreme Court of Louisiana.

BLOOM *v.* ILLINOIS.

CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

No. 52. Argued January 16–17, 1968.—Decided May 20, 1968.

Petitioner was convicted in Illinois of criminal contempt and sentenced to 24 months' imprisonment for willfully petitioning to admit to probate a will falsely prepared and executed after the putative testator's death. His request for a jury trial was refused by the trial court. The Illinois Supreme Court affirmed his conviction. *Held:*

1. In view of the holdings in *United States* v. *Barnett*, 376 U. S. 681 (1964); *Cheff* v. *Schnackenberg*, 384 U. S. 373 (1966), and *Duncan* v. *Louisiana*, *ante*, p. 145, the broad rule that all criminal contempts can be constitutionally tried without a jury is re-examined. Pp. 195–198.

2. Criminal contempt is a crime in every essential respect; serious criminal contempts are so nearly like other serious crimes that they are subject to the Constitution's jury trial provisions and only petty contempts may be tried without honoring demands for trial by jury. The progression of legislative and judicial restrictions on the unfettered power to try contempts summarily reflects this identity and underlines the need to extend traditional protections to trials for serious contempts. Pp. 201–210.

3. To the extent that summary punishment for criminal contempts preserves the dignity, effectiveness and efficiency of the judicial process, those interests are outweighed by the need to provide the defendant charged with a serious criminal contempt with all the procedural protections deemed fundamental to our judicial system. The power to commit for civil contempt and to punish petty criminal contempts summarily is unaffected. Pp. 208–210.

4. When the legislature has not expressed a judgment as to the seriousness of an offense by fixing a maximum penalty, the best evidence as to the seriousness of the offense is the penalty actually imposed. Accordingly, petitioner, sentenced to a two-year prison term, was constitutionally entitled to a jury trial. See *Duncan* v. *Louisiana*, *supra*. Pp. 210–211.

35 Ill. 2d 255, 220 N. E. 2d 475, reversed and remanded.

Anthony Bradley Eben argued the cause for petitioner. With him on the briefs was *Herbert F. Friedman.*

Edward J. Hladis argued the cause for respondent. With him on the brief were *John J. Stamos* and *Ronald Butler.*

MR. JUSTICE WHITE delivered the opinion of the Court.

Petitioner was convicted in an Illinois state court of criminal contempt and sentenced to imprisonment for 24 months for willfully petitioning to admit to probate a will falsely prepared and executed after the death of the putative testator. Petitioner made a timely demand for jury trial which was refused. Since in *Duncan* v. *Louisiana, ante,* p. 145, the Constitution was held to guarantee the right to jury trial in serious criminal cases in state courts, we must now decide whether it also guarantees the right to jury trial for a criminal contempt punished by a two-year prison term.

I.

Whether federal and state courts may try criminal contempt cases without a jury has been a recurring question in this Court. Article III, § 2, of the Constitution provides that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . ." The Sixth Amendment states that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." The Fifth and Fourteenth Amendments forbid both the Federal Government and the States from depriving any person of "life, liberty, or property, without due process of law." Notwithstanding these provisions, until *United States* v. *Barnett,* 376 U. S. 681, rehearing denied, 377 U. S. 973 (1964), the Court consistently upheld the constitutional power of the state and federal courts to punish

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any criminal contempt without a jury trial. *Eilenbecker* v. *District Court of Plymouth County,* 134 U. S. 31, 36–39 (1890); *I. C. C.* v. *Brimson,* 154 U. S. 447, 488–489 (1894); *In re Debs,* 158 U. S. 564, 594–596 (1895); *Gompers* v. *United States,* 233 U. S. 604, 610–611 (1914); *Green* v. *United States,* 356 U. S. 165, 183–187 (1958).[1] These cases construed the Due Process Clause and the otherwise inclusive language of Article III and the Sixth Amendment as permitting summary trials in contempt cases because at common law contempt was tried without a jury and because the power of courts to punish for contempt without the intervention of any other agency was considered essential to the proper and effective functioning of the courts and to the administration of justice.

United States v. *Barnett, supra,* signaled a possible change of view. The Court of Appeals for the Fifth Circuit certified to this Court the question whether there was a right to jury trial in an impending contempt proceeding. Following prior cases, a five-man majority held that there was no constitutional right to jury trial in all contempt cases. Criminal contempt, intrinsically and aside from the particular penalty imposed, was not

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[1] Many more cases have supported the rule that courts may punish criminal contempt summarily, or accepted that rule without question. See cases collected in *Green* v. *United States,* 356 U. S. 165, 191, n. 2 (1958) (concurring opinion); *United States* v. *Barnett,* 376 U. S. 681, 694, n. 12 (1964). The list of the Justices of this Court who have apparently subscribed to this view is long. See *Green* v. *United States, supra,* at 192.

The argument that the power to punish contempt was an inherent power of the courts not subject to regulation by Congress was rejected in *Michaelson* v. *United States ex rel. Chicago, St. P., M. & O. R. Co.,* 266 U. S. 42, 65–67 (1924), which upheld the maximum sentence and jury trial provisions of the Clayton Act. Cf. Larremore, Constitutional Regulation of Contempt of Court, 13 Harv. L. Rev. 615 (1900).

deemed a serious offense requiring the protection of the constitutional guarantees of the right to jury trial. However, the Court put aside as not raised in the certification or firmly settled by prior cases, the issue whether a severe punishment would itself trigger the right to jury trial and indicated, without explication, that some members of the Court were of the view that the Constitution limited the punishment which could be imposed where the contempt was tried without a jury. 376 U. S., at 694–695 and n. 12.

Two years later, in *Cheff* v. *Schnackenberg,* 384 U. S. 373 (1966), which involved a prison term of six months for contempt of a federal court, the Court rejected the claim that the Constitution guaranteed a right to jury trial in all criminal contempt cases. Contempt did not "of itself" warrant treatment as other than a petty offense; the six months' punishment imposed permitted dealing with the case as a prosecution for "a petty offense, which under our decisions does not require a jury trial." 384 U. S. 373, 379–380 (1966). See *Callan* v. *Wilson,* 127 U. S. 540 (1888); *Schick* v. *United States,* 195 U. S. 65 (1904); *District of Columbia* v. *Clawans,* 300 U. S. 617 (1937). It was not necessary in *Cheff* to consider whether the constitutional guarantees of the right to jury trial applied to a prosecution for a serious contempt. Now, however, because of our holding in *Duncan* v. *Louisiana, supra,* that the right to jury trial extends to the States, and because of Bloom's demand for a jury in this case, we must once again confront the broad rule that all criminal contempts can be constitutionally tried without a jury. *Barnett* presaged a re-examination of this doctrine at some later time; that time has now arrived.

In proceeding with this task, we are acutely aware of the responsibility we assume in entertaining challenges to a constitutional principle which is firmly entrenched

and which has behind it weighty and ancient authority. Our deliberations have convinced us, however, that serious contempts are so nearly like other serious crimes that they are subject to the jury trial provisions of the Constitution, now binding on the States, and that the traditional rule is constitutionally infirm insofar as it permits other than petty contempts to be tried without honoring a demand for a jury trial. We accept the judgment of *Barnett* and *Cheff* that criminal contempt is a petty offense unless the punishment makes it a serious one; but, in our view, dispensing with the jury in the trial of contempts subjected to severe punishment represents an unacceptable construction of the Constitution, "an unconstitutional assumption of powers by the [courts] which no lapse of time or respectable array of opinion should make us hesitate to correct." *Black & White Taxicab & Transfer Co.* v. *Brown & Yellow Taxicab & Transfer Co.*, 276 U. S. 518, 533 (1928) (Holmes, J., dissenting). The rule of our prior cases has strong, though sharply challenged, historical support; [2] but neither this circumstance nor the considera-

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[2] Blackstone's description of the common-law practice in contempt cases appears in 4 Commentaries on the Laws of England 286–287:

"The process of attachment for these and the like contempts must necessarily be as ancient as the laws themselves; for laws without a competent authority to secure their administration from disobedience and contempt would be vain and nugatory. A power, therefore, in the supreme courts of justice, to suppress such contempts by an immediate attachment of the offender results from the first principles of judicial establishments, and must be an inseparable attendant upon every superior tribunal.

. . . . . .

"If the contempt be committed in the face of the court, the offender may be instantly apprehended and imprisoned, at the discretion of the judges, without any further proof or examination. But in matters that arise at a distance, and of which the court cannot have so perfect a knowledge, unless by the confession of the party or the testimony of others, if the judges upon *affidavit* see sufficient

tions of necessity and efficiency normally offered in defense of the established rule, justify denying a jury trial in serious criminal contempt cases. The Constitu-

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ground to suspect that a contempt has been committed, they either make a rule on the suspected party to show cause why an attachment should not issue against him, or, in very flagrant instances of contempt, the attachment issues in the first instance; as it also does if no sufficient cause be shown to discharge; and thereupon the court confirms and makes absolute the original rule." And see *id.*, at 280. A similar account is contained in 2 W. Hawkins, A Treatise of the Pleas of the Crown 4, 141 (2d ed. 1724).

Of course, "Blackstone's Commentaries are accepted as the most satisfactory exposition of the common law of England. . . . [U]ndoubtedly the framers of the Constitution were familiar with it." *Schick* v. *United States*, 195 U. S. 65, 69 (1904).

Blackstone, however, was acutely aware that this practice was a significant departure from ordinary principles: "It cannot have escaped the attention of the reader that this method of making the defendant answer upon oath to a criminal charge is not agreeable to the genius of the common law in any other instance . . . ." 4 Blackstone, *supra*, at 287.

The unalloyed doctrine that by "immemorial usage" all criminal contempts could be tried summarily seems to derive from Mr. Justice (later Chief Justice) Wilmot's undelivered opinion in *The King* v. *Almon* (1765), first brought to public light by the posthumous publication of his papers, Wilmot, Notes 243 (1802), reprinted in 97 Eng. Rep. 94. Wilmot's opinion appears to have been the source of Blackstone's view, but did not become an authoritative part of the law of England until *Rex* v. *Clement*, 4 Barn. & Ald. 218, 233, 106 Eng. Rep. 918, 923 (K. B. 1821). Cf. *Roach* v. *Garvan*, 2 Atk. 469, 26 Eng. Rep. 683 (Ch. 1742). See discussion in 8 How. St. Tr. 14, 22–23, 49–59, and the subsequent civil action, *Burdett* v. *Abbot*, 14 East 1, 138, 104 Eng. Rep. 501, 554 (K. B. 1811); 4 Taunt. 401, 128 Eng. Rep. 384 (Ex. 1812); 5 Dow 165, 202, 3 Eng. Rep. 1289, 1302 (H. L. 1817). The historical authenticity of this view has been vigorously challenged, initially by Solly-Flood, The Story of Prince Henry of Monmouth and Chief-Justice Gascoign, 3 Transactions of the Royal Historical Society (N. S.) 47, 61–64, 147–150 (1886). This led to the massive reappraisal of the contempt power undertaken by Sir John Fox: *The King* v. *Almon*, Pts. 1 & 2, 24 L. Q. Rev. 184, 266 (1908); The Summary Process to Punish Contempt, Pts. 1 & 2, 25 L. Q. Rev. 238, 354 (1909); Eccentricities

tion guarantees the right to jury trial in state court prosecutions for contempt just as it does for other crimes.

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of the Law of Contempt of Court, 36 L. Q. Rev. 394 (1920); The Nature of Contempt of Court, 37 L. Q. Rev. 191 (1921); The Practice in Contempt of Court Cases, 38 L. Q. Rev. 185 (1922); The Writ of Attachment, 40 L. Q. Rev. 43 (1924); J. Fox, The History of Contempt of Court (1927). On contempt generally, see R. Goldfarb, The Contempt Power (1963).

Learned writers have interpreted Fox's work as showing that until the late 17th or early 18th centuries, apart from the extraordinary proceedings of the Star Chamber, English courts neither had, nor claimed, power to punish contempts, whether in or out of court, by summary process. Frankfurter & Landis, Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers, 37 Harv. L. Rev. 1010, 1042–1052 (1924). Cf. J. Oswald, Contempt of Court 3, n. (*g*) (Robertson ed., 1910). Fox's own appraisal of the evidence, however, seems to have been that prior to the 18th century there probably was no valid basis for summary punishment of a libel on the court by a stranger to the proceedings, but that summary punishment for contempts outside the court consisting in resistance to a lawful process or order of the court, or contumacious behavior by an officer of the court, was probably permissible. J. Fox, The History of Contempt of Court 4, 49–50, 98–100, 108–110, 208–209 (1927); Fox, The Summary Process to Punish Contempt, Pt. 1, 25 L. Q. Rev. 238, 244-246 (1909). Although jury trials had been provided in some instances of contempt in the face of the court, Fox does not seem to have questioned that such contempts could be punished summarily. J. Fox, The History of Contempt of Court 50 (1927).

We do not find the history of criminal contempt sufficiently simple or unambiguous to rest rejection of our prior decisions entirely on historical grounds, particularly since the Court has been aware of Solly-Flood's and Fox's work for many years. See *Gompers* v. *United States*, 233 U. S. 604, 611 (1914); *Michaelson* v. *United States ex rel. Chicago, St. P., M. & O. R. Co.*, 266 U. S. 42, 66–67 (1924); *Green* v. *United States*, 356 U. S. 165, 185, n. 18 (1958). In any event, the ultimate question is not whether the traditional doctrine is historically correct but whether the rule that criminal contempts are never entitled to a jury trial is a necessary or an acceptable construction of the Constitution. Cf. *Thompson* v. *Utah*, 170 U. S. 343, 350 (1898).

II.

Criminal contempt is a crime in the ordinary sense; it is a violation of the law, a public wrong which is punishable by fine or imprisonment or both. In the words of Mr. Justice Holmes:

> "These contempts are infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech." *Gompers* v. *United States*, 233 U. S. 604, 610 (1914).[3]

Criminally contemptuous conduct may violate other provisions of the criminal law; but even when this is not the case convictions for criminal contempt are indistinguishable from ordinary criminal convictions, for their impact on the individual defendant is the same. Indeed, the role of criminal contempt and that of many ordinary criminal laws seem identical—protection of the institutions of our government and enforcement of their mandates.

Given that criminal contempt is a crime in every fundamental respect, the question is whether it is a crime to which the jury trial provisions of the Constitution

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[3] See also *New Orleans* v. *The Steamship Co.*, 20 Wall. 387, 392 (1874) ("[c]ontempt of court is a specific criminal offence"); *O'Neal* v. *United States*, 190 U. S. 36, 38 (1903) (an adjudication for contempt is "in effect a judgment in a criminal case"); *Bessette* v. *W. B. Conkey Co.*, 194 U. S. 324, 336 (1904) (that criminal contempt proceedings are "criminal in their nature has been constantly affirmed"); *Michaelson* v. *United States ex rel. Chicago, St. P., M. & O. R. Co.*, 266 U. S. 42, 66 (1924) ("[t]he fundamental characteristics of both [crimes and criminal contempts] are the same"); *Green* v. *United States*, 356 U. S. 165, 201 (1958) (BLACK, J., dissenting) ("criminal contempt is manifestly a crime by every relevant test of reason or history"). The Court also held in *Bessette*, *supra*, at 335, that criminal contempt "cannot be considered as an infamous crime."

apply. We hold that it is, primarily because in terms of those considerations which make the right to jury trial fundamental in criminal cases, there is no substantial difference between serious contempts and other serious crimes. Indeed, in contempt cases an even more compelling argument can be made for providing a right to jury trial as a protection against the arbitrary exercise of official power. Contemptuous conduct, though a public wrong, often strikes at the most vulnerable and human qualities of a judge's temperament. Even when the contempt is not a direct insult to the court or the judge, it frequently represents a rejection of judicial authority, or an interference with the judicial process or with the duties of officers of the court.

The court has long recognized the potential for abuse in exercising the summary power to imprison for contempt—it is an "arbitrary" power which is "liable to abuse." *Ex parte Terry*, 128 U. S. 289, 313 (1888). "[I]ts exercise is a delicate one and care is needed to avoid arbitrary or oppressive conclusions." *Cooke* v. *United States*, 267 U. S. 517, 539 (1925).[4]

These apprehensions about the unbridled power to punish summarily for contempt are reflected in the march of events in both Congress and the courts since our Constitution was adopted. The federal courts were established by the Judiciary Act of 1789; § 17 of the Act provided that those courts "shall have power to . . . punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same . . . ." 1 Stat. 83. See *Anderson* v.

[4] "That contempt power over counsel, summary or otherwise, is capable of abuse is certain. Men who make their way to the bench sometimes exhibit vanity, irascibility, narrowness, arrogance, and other weaknesses to which human flesh is heir." *Sacher* v. *United States*, 343 U. S. 1, 12 (1952). See also *Ex parte Hudgings*, 249 U. S. 378 (1919); *Nye* v. *United States*, 313 U. S. 33 (1941); *Cammer* v. *United States*, 350 U. S. 399 (1956).

Dunn, 6 Wheat. 204, 227–228 (1821). This open-ended authority to deal with contempt, limited only as to mode of punishment, proved unsatisfactory to Congress. Abuses under the 1789 Act culminated in the unsuccessful impeachment proceedings against James Peck, a federal district judge who had imprisoned and disbarred one Lawless for publishing a criticism of one of Peck's opinions in a case which was on appeal. The result was drastic curtailment of the contempt power in the Act of 1831, 4 Stat. 487. *Ex parte Robinson*, 19 Wall. 505, 510–511 (1874); *In re Savin*, 131 U. S. 267, 275–276 (1889). That Act limited the contempt power to misbehavior in the presence of the court or so near thereto as to obstruct justice; misbehavior of court officers in their official transactions; and disobedience of or resistance to the lawful writ, process, order, or decree of the court.[5] This major revision of the contempt power in the federal sphere, which "narrowly confined" and "substantially curtailed" the authority to punish contempt summarily, *Nye* v. *United States*, 313 U. S. 33, 47–48 (1941), has continued to the present day as the basis for the general

[5] Section 1 of the Act of 1831 stated:

"That the power of the several courts of the United States to issue attachments and inflict summary punishments for contempts of court, shall not be construed to extend to any cases except the misbehaviour of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice, the misbehaviour of any of the officers of the said courts in their official transactions, and the disobedience or resistance by any officer of the said courts, party, juror, witness, or any other person or persons, to any lawful writ, process, order, rule, decree, or command of the said courts." Fox concluded that the 1831 Act was in accord with the general common law of England. See J. Fox, The History of Contempt of Court 208 (1927). Section 2 of the Act provided for prosecution by the regular criminal procedures of those guilty of obstruction of justice. See generally Nelles & King, Pts. 1 & 2, Contempt by Publication in the United States, 28 Col. L. Rev. 401, 525 (1928).

power to punish criminal contempt.[6] 62 Stat. 701, 18 U. S. C. § 401.

The courts also proved sensitive to the potential for abuse which resides in the summary power to punish contempt. Before the 19th century was out, a distinction had been carefully drawn between contempts occurring within the view of the court, for which a hearing and formal presentation of evidence were dispensed with, and all other contempts where more normal adversary procedures were required. *Ex parte Terry*, 128 U. S. 289 (1888); *In re Savin*, 131 U. S. 267 (1889). Later,

[6] At a later date, when passing the Clayton Act, Congress focused its attention on conduct which was not only criminally contemptuous but which also constituted other crimes under federal or state law. Contempts of this nature, unless committed in the presence of the court or so near thereto as to obstruct justice, or unless they involved disobedience to a court writ, process, order, or decree in a case brought by the United States, were required to be tried to a jury, and the possible punishment was limited to six months, a fine of $1,000, or both. 38 Stat. 738, § 21, now 18 U. S. C. § 402. Circumscription of the contempt power was carried further in the Norris-LaGuardia Act, which extended the right to jury trial to contempt cases arising out of injunctions issued in labor disputes. 47 Stat. 72, § 11, now 18 U. S. C. § 3692. The Civil Rights Act of 1957, 71 Stat. 638, § 151, 42 U. S. C. § 1995, provides a right to a *de novo* trial by jury to all criminal contemnors convicted in cases arising under the Act who are fined in excess of $300 or sentenced to imprisonment for more than 45 days, exception being made for contempts committed in the presence of the court or so near thereto as to obstruct justice, and misbehavior, misconduct, or disobedience of any officer of the court. The Civil Rights Act of 1964, 78 Stat. 268, § 1101, 42 U. S. C. § 2000h, provides a right to jury trial in all proceedings for criminal contempt arising under the Act, and limits punishment to a fine of $1,000 or imprisonment for six months. Again exception is made for contempts committed in the presence of the court, or so near thereto as to obstruct justice, and for the misbehavior, misconduct, or disobedience of court officers. Proof of criminal *mens rea* is specifically required. See Goldfarb & Kurzman, Civil Rights v. Civil Liberties: The Jury Trial Issue, 12 U. C. L. A. L. Rev. 486, 496–506 (1965).

the Court could say "it is certain that in proceedings for criminal contempt the defendant is presumed to be innocent, he must be proved to be guilty beyond a reasonable doubt, and cannot be compelled to testify against himself." *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 444 (1911). See *Michaelson* v. *United States ex rel. Chicago, St. P., M. & O. R. Co.*, 266 U. S. 42, 66 (1924). Chief Justice Taft speaking for a unanimous Court in *Cooke* v. *United States*, 267 U. S. 517, 537 (1925), said:

> "Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel, if requested, and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed."

Cf. *Blackmer* v. *United States*, 284 U. S. 421, 440 (1932). It has also been recognized that the defendant in criminal contempt proceedings is entitled to a public trial before an unbiased judge, *In re Oliver*, 333 U. S. 257 (1948); *Offutt* v. *United States*, 348 U. S. 11 (1954); see *Ungar* v. *Sarafite*, 376 U. S. 575 (1964); but cf. *Levine* v. *United States*, 362 U. S. 610 (1960).[7] In the federal system many of the procedural protections available to criminal contemnors are set forth in Fed. Rule Crim. Proc. 42.

Judicial concern has not been limited to procedure. In *Toledo Newspaper Co.* v. *United States*, 247 U. S.

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[7] It has also been held that a defendant in criminal contempt proceedings is eligible for executive pardon, *Ex parte Grossman*, 267 U. S. 87 (1925), and entitled to the protection of the statute of limitations, *Gompers* v. *United States*, 233 U. S. 604, 611–613 (1914); *Pendergast* v. *United States*, 317 U. S. 412 (1943).

402 (1918), the Court endorsed a broad construction of the language of the Act of 1831 permitting summary trial of contempts "so near [to the court] as to obstruct the administration of justice." It required only that the conduct have a "tendency to prevent and obstruct the discharge of judicial duty . . . ." *Id.*, at 419. See *Craig* v. *Hecht*, 263 U. S. 255, 277 (1923). This view proved aberrational and was overruled in *Nye* v. *United States*, 313 U. S. 33, 47–52 (1941), which narrowly limited the conduct proscribed by the 1831 Act to "misbehavior in the vicinity of the court disrupting to quiet and order or actually interrupting the court in the conduct of its business." *Id.*, at 52. Cf. *Toledo Newspaper Co.* v. *United States*, *supra*, at 422 (Holmes, J., dissenting). The congressional purpose to fence in the power of the federal courts to punish contempt summarily was further implemented in *Cammer* v. *United States*, 350 U. S. 399, 407–408 (1956). A lawyer, the Court held, "is not the kind of 'officer' who can be summarily tried for contempt under 18 U. S. C. § 401 (2)." In another development, the First Amendment was invoked to ban punishment for a broad category of arguably contemptuous out-of-court conduct. *Bridges* v. *California*, 314 U. S. 252 (1941); *Pennekamp* v. *Florida*, 328 U. S. 331 (1946); *Craig* v. *Harney*, 331 U. S. 367 (1947). Finally, over the years in the federal system there has been a recurring necessity to set aside punishments for criminal contempt as either unauthorized by statute or too harsh. *E. g.*, *Ex parte Robinson*, 19 Wall. 505 (1874); *United States* v. *United Mine Workers*, 330 U. S. 258 (1947); *Yates* v. *United States*, 355 U. S. 66 (1957).[8]

[8] Limitations on the maximum penalties for criminal contempt are common in the States. According to Note, Constitutional Law: The Supreme Court Constructs a Limited Right to Trial by Jury for Federal Criminal Contemnors, 1967 Duke L. J. 632, 654, n. 84, in 26 States the maximum penalty that can be imposed in the absence of a

This course of events demonstrates the unwisdom of vesting the judiciary with completely untrammeled power to punish contempt, and makes clear the need for effective safeguards against that power's abuse. Prosecutions for contempt play a significant role in the proper functioning of our judicial system; but despite the important values which the contempt power protects, courts and legislatures have gradually eroded the power of judges to try contempts of their own authority. In modern times, procedures in criminal contempt cases have come to mirror those used in ordinary criminal cases. Our experience teaches that convictions for criminal contempt, not infrequently resulting in extremely serious penalties, see *United States* v. *Barnett*, 376 U. S. 681, 751 (Goldberg, J., dissenting), are indistinguishable from those obtained under ordinary criminal

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jury trial is six months or less, in three States a jury trial must be provided upon demand of the defendant, in three other States the maximum penalty cannot exceed one year (this group of States includes Illinois, however, which, as the present case demonstrates, has no such limitation), in 15 States there is either no limitation upon the maximum penalty which may be imposed, or else that maximum exceeds one year, and finally, in three States, while there are statutes relating to particular kinds of contempt, there are no general contempt provisions. Independent examination suggests that the available materials concerning the law of contempt in some States are such that precise computation is difficult. It is clear, however, that punishment for contempt is limited to one year or less in over half the States.

Most other Western countries seem to be highly restrictive of the latitude given judges to try their own contempts without a jury. See Jann, Contempt of Court in Western Germany, 8 Am. U. L. Rev. 34 (1959); Bigelow, Contempt of Court, 1 Crim. L. Q. 475 (1959); Pekelis, Legal Techniques and Political Ideologies: A Comparative Study, 41 Mich. L. Rev. 665 (1943). By contrast, there was no right of appeal against a conviction for criminal contempt in England until the Administration of Justice Act, 1960, 8 & 9 Eliz. 2, c. 65. See Harnon, Civil and Criminal Contempts of Court, 25 Mod. L. Rev. 179 (1962).

laws. If the right to jury trial is a fundamental matter in other criminal cases, which we think it is, it must also be extended to criminal contempt cases.

III.

Nor are there compelling reasons for a contrary result. As we read the earlier cases in this Court upholding the power to try contempts without a jury, it was not doubted that the summary power was subject to abuse or that the right to jury trial would be an effective check. Rather, it seems to have been thought that summary power was necessary to preserve the dignity, independence, and effectiveness of the judicial process—"To submit the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency." *In re Debs*, 158 U. S. 564, 595 (1895). It is at this point that we do not agree: in our judgment, when serious punishment for contempt is contemplated, rejecting a demand for jury trial cannot be squared with the Constitution or justified by considerations of efficiency or the desirability of vindicating the authority of the court.

We cannot say that the need to further respect for judges and courts is entitled to more consideration than the interest of the individual not to be subjected to serious criminal punishment without the benefit of all the procedural protections worked out carefully over the years and deemed fundamental to our system of justice. Genuine respect, which alone can lend true dignity to our judicial establishment, will be engendered, not by the fear of unlimited authority, but by the firm administration of the law through those institutionalized procedures which have been worked out over the centuries.

We place little credence in the notion that the independence of the judiciary hangs on the power to try contempts summarily and are not persuaded that the

additional time and expense possibly involved in submitting serious contempts to juries will seriously handicap the effective functioning of the courts. We do not deny that serious punishment must sometimes be imposed for contempt, but we reject the contention that such punishment must be imposed without the right to jury trial. The goals of dispatch, economy, and efficiency are important, but they are amply served by preserving the power to commit for civil contempt and by recognizing that many contempts are not serious crimes but petty offenses not within the jury trial provisions of the Constitution. When a serious contempt is at issue, considerations of efficiency must give way to the more fundamental interest of ensuring the even-handed exercise of judicial power. In isolated instances recalcitrant or irrational juries may acquit rather than apply the law to the case before them. Our system has wrestled with this problem for hundreds of years, however, and important safeguards have been devised to minimize miscarriages of justice through the malfunctioning of the jury system. Perhaps to some extent we sacrifice efficiency, expedition, and economy, but the choice in favor of jury trial has been made, and retained, in the Constitution. We see no sound reason in logic or policy not to apply it in the area of criminal contempt.

Some special mention of contempts in the presence of the judge is warranted. Rule 42 (a) of the Federal Rules of Criminal Procedure provides that "[a] criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court." This rule reflects the common-law rule which is widely if not uniformly followed in the States. Although Rule 42 (a) is based in part on the premise that it is not necessary specially to present the facts of a contempt which occurred in the very presence of the

judge, it also rests on the need to maintain order and a deliberative atmosphere in the courtroom. The power of a judge to quell disturbance cannot attend upon the impaneling of a jury. There is, therefore, a strong temptation to make exception to the rule we establish today for disorders in the courtroom. We are convinced, however, that no such special rule is needed. It is old law that the guarantees of jury trial found in Article III and the Sixth Amendment do not apply to petty offenses. Only today we have reaffirmed that position. *Duncan* v. *Louisiana, supra,* at 159–162. By deciding to treat criminal contempt like other crimes insofar as the right to jury trial is concerned, we similarly place it under the rule that petty crimes need not be tried to a jury.

IV.

Petitioner Bloom was held in contempt of court for filing a spurious will for probate. At his trial it was established that the putative testator died on July 6, 1964, and that after that date Pauline Owens, a practical nurse for the decedent, engaged Bloom to draw and execute a will in the decedent's name. The will was dated June 21, 1964. Bloom knew the will was false when he presented it for admission in the Probate Division of the Circuit Court of Cook County. The State's Attorney of that county filed a complaint charging Bloom with contempt of court. At trial petitioner's timely motion for a jury trial was denied. Petitioner was found guilty of criminal contempt and sentenced to imprisonment for 24 months. On direct appeal to the Illinois Supreme Court, his conviction was affirmed. That court held that neither state law nor the Federal Constitution provided a right to jury trial in criminal contempt proceedings. 35 Ill. 2d 255, 220 N. E. 2d 475 (1966). We granted certiorari, 386 U. S. 1003 (1967).

Petitioner Bloom contends that the conduct for which he was convicted of criminal contempt constituted the

crime of forgery under Ill. Rev. Stat., c. 38, § 17–3. Defendants tried under that statute enjoy a right to jury trial and face a possible sentence of one to 14 years, a fine not to exceed $1,000, or both. Petitioner was not tried under this statute, but rather was convicted of criminal contempt. Under Illinois law no maximum punishment is provided for convictions for criminal contempt. *People* v. *Stollar*, 31 Ill. 2d 154, 201 N. E. 2d 97 (1964). In *Duncan* we have said that we need not settle "the exact location of the line between petty offenses and serious crimes" but that "a crime punishable by two years in prison is . . . a serious crime and not a petty offense." *Supra*, at 161, 162. Bloom was sentenced to imprisonment for two years. Our analysis of *Barnett*, *supra*, and *Cheff* v. *Schnackenberg*, 384 U. S. 373, makes it clear that criminal contempt is not a crime of the sort that requires the right to jury trial regardless of the penalty involved. Under the rule in *Cheff*, when the legislature has not expressed a judgment as to the seriousness of an offense by fixing a maximum penalty which may be imposed, we are to look to the penalty actually imposed as the best evidence of the seriousness of the offense. See *Duncan*, *supra*, at 162, n. 35. Under this rule it is clear that Bloom was entitled to the right to trial by jury, and it was constitutional error to deny him that right. Accordingly, we reverse and remand for proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE FORTAS, concurring.*

I join the judgments and opinions of the Court in these cases because I agree that the Due Process Clause of the Fourteenth Amendment requires that the States accord the right to jury trial in prosecutions for offenses

*[This opinion applies also to No. 410, *Duncan* v. *Louisiana*, *ante*, p. 145.]

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that are not petty. A powerful reason for reaching this conclusion is that the Sixth Amendment to the Constitution guarantees the right to jury trial in federal prosecutions for such offenses. It is, of course, logical and reasonable that in seeking, from time to time, the content of "due process of law," we should look to and be guided by the great Bill of Rights in our Constitution. Considerations of the practice of the forum States, of the States generally, and of the history and office of jury trials are also relevant to our task. I believe, as my Brother WHITE's opinion for the Court in *Duncan* v. *Louisiana* persuasively argues, that the right to jury trial in major prosecutions, state as well as federal, is so fundamental to the protection of justice and liberty that "due process of law" cannot be accorded without it.

It is the progression of history, and especially the deepening realization of the substance and procedures that justice and the demands of human dignity require, which has caused this Court to invest the command of "due process of law" with increasingly greater substance. The majority lists outstanding stations in this progression, *ante*, at 147–148. This Court has not been alone in its progressive recognition of the content of the great phrase which my Brother WHITE describes as "spacious language" and Learned Hand called a "majestic generality." The Congress, state courts, and state legislatures have moved forward with the advancing conception of human rights in according procedural as well as substantive rights to individuals accused of conflict with the criminal laws.†

† See, *e. g.*, Bail Reform Act of 1966, Pub. L. 89–465, 18 U. S. C. § 3141 *et seq.* (1964 ed., Supp. II); Criminal Justice Act of 1964, Pub. L. 88–455, 18 U. S. C. § 3006A; Jury Selection and Service Act of 1968, Pub. L. 90–274, 82 Stat. 53; *Schowgurow* v. *State*, 240 Md. 121, 213 A. 2d 475 (1965); Note, The Proposed Penal Law of New York, 64 Col. L. Rev. 1469 (1964).

But although I agree with the decision of the Court, I cannot agree with the implication, see *ante*, at 158–159, n. 30, that the tail must go with the hide: that when we hold, influenced by the Sixth Amendment, that "due process" requires that the States accord the right of jury trial for all but petty offenses, we automatically import all of the ancillary rules which have been or may hereafter be developed incidental to the right to jury trial in the federal courts. I see no reason whatever, for example, to assume that our decision today should require us to impose federal requirements such as unanimous verdicts or a jury of 12 upon the States. We may well conclude that these and other features of federal jury practice are by no means fundamental—that they are not essential to due process of law—and that they are not obligatory on the States.

I would make these points clear today. Neither logic nor history nor the intent of the draftsmen of the Fourteenth Amendment can possibly be said to require that the Sixth Amendment or its jury trial provision be applied to the States together with the total gloss that this Court's decisions have supplied. The draftsmen of the Fourteenth Amendment intended what they said, not more or less: that no State shall deprive any person of life, liberty, or property without due process of law. It is ultimately the duty of this Court to interpret, to ascribe specific meaning to this phrase. There is no reason whatever for us to conclude that, in so doing, we are bound slavishly to follow not only the Sixth Amendment but all of its bag and baggage, however securely or insecurely affixed they may be by law and precedent to federal proceedings. To take this course, in my judgment, would be not only unnecessary but mischievous because it would inflict a serious blow upon the principle of federalism. The Due Process Clause commands us to apply its great standard to state court proceedings

to assure basic fairness. It does not command us rigidly and arbitrarily to impose the exact pattern of federal proceedings upon the 50 States. On the contrary, the Constitution's command, in my view, is that in our insistence upon state observance of due process, we should, so far as possible, allow the greatest latitude for state differences. It requires, within the limits of the lofty basic standards that it prescribes for the States as well as the Federal Government, maximum opportunity for diversity and minimal imposition of uniformity of method and detail upon the States. Our Constitution sets up a federal union, not a monolith.

This Court has heretofore held that various provisions of the Bill of Rights such as the freedom of speech and religion guarantees of the First Amendment, the prohibition of unreasonable searches and seizures in the Fourth Amendment, the privilege against self-incrimination of the Fifth Amendment, and the right to counsel and to confrontation under the Sixth Amendment "are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment." *Malloy* v. *Hogan*, 378 U. S. 1, 10 (1964); *Pointer* v. *Texas*, 380 U. S. 400, 406 (1965); *Miranda* v. *Arizona*, 384 U. S. 436, 464 (1966). I need not quarrel with the specific conclusion in those specific instances. But unless one adheres slavishly to the incorporation theory, body and substance, the same conclusion need not be superimposed upon the jury trial right. I respectfully but urgently suggest that it should not be. Jury trial is more than a principle of justice applicable to individual cases. It is a system of administration of the business of the State. While we may believe (and I do believe) that the right of jury trial is fundamental, it does not follow that the particulars of according that right must be uniform. We

should be ready to welcome state variations which do not impair—indeed, which may advance—the theory and purpose of trial by jury.

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, dissenting.

I dissent for the reasons expressed in my dissenting opinion in *Duncan* v. *Louisiana*, *ante*, p. 171, and in my separate opinion in *Cheff* v. *Schnackenberg*, 384 U. S. 373, 380. See also *United States* v. *Barnett*, 376 U. S. 681; *Green* v. *United States*, 356 U. S. 165.

This case completes a remarkable circle. In *Duncan*, *supra*, the Court imposed on the States a rule of procedure that was neither shown to be fundamental to procedural fairness nor held to be part of the originally understood content of the Fourteenth Amendment. The sole justification was that the rule was found in the Bill of Rights. The Court now, without stating any additional reasons, imposes on the States a related rule that, as recently as *Cheff* v. *Schnackenberg*, *supra*, the Court declined to find in the Bill of Rights. That the words of Mr. Justice Holmes,* inveighing against a century of "unconstitutional assumption of [state] powers by the Courts of the United States" in derogation of the central premise of our Constitution, should be invoked to support the Court's action here can only be put down to the vagaries of the times.

**Black & White Taxicab & Transfer Co.* v. *Brown & Yellow Taxicab & Transfer Co.*, 276 U. S. 518, 532, at 533 (dissenting opinion, quoted *ante*, at 198).

DYKE ET AL. *v.* TAYLOR IMPLEMENT MANUFACTURING CO., INC.

CERTIORARI TO THE SUPREME COURT OF TENNESSEE.

No. 149. Argued January 18, 1968.—Decided May 20, 1968.

In connection with a labor dispute, a Tennessee county chancery court issued an injunction which, *inter alia*, barred inflicting harm or damage to respondent company's employees. About a month later, a shot was fired from a car at the house of one of respondent's nonstriking employees. A deputy sheriff, presumably informed of the crime but without a description of the car or further details, pursued a suspicious car which raced away but was ultimately stopped by policemen, who arrested petitioners, the car's occupants, apparently for reckless driving. The deputy sheriff arrived, and he and the policemen noted a fresh bullet hole in the car. They took petitioners to jail, and the policemen parked the car on the street outside, apparently as a convenience to the car's owner. The deputy sheriff and several policemen made a warrantless search of the car and found an air rifle under the front seat. Over petitioners' objection evidence about the gun was admitted at their trial before the chancellor for criminal contempt for violating the injunction. Petitioners were found guilty and given the maximum sentence of 10 days in jail and a $50 fine. The State Supreme Court affirmed, rejecting petitioners' contentions that the convictions violated their constitutional rights because a jury trial was denied and because evidence concerning the gun, which they claimed had been illegally seized, had been admitted. *Held:*

1. In the light of the maximum sentence which the Tennessee statutes allowed, the criminal contempt for which petitioners were convicted was a "petty offense," to which the federal constitutional right of a jury trial does not extend. Pp. 219–220.

2. The evidence in the record is insufficient to justify the conclusion that the officers before they began their warrantless search of the car had "reasonable or probable cause" to believe that they would find an instrumentality of a crime or evidence pertaining to a crime. The applicability of *Brinegar* v. *United States*, 338 U. S. 160 (1949), to a warrantless search of a parked automobile upon probable cause therefore need not be decided, and petitioners' claim must be sustained that the gun was illegally

seized and evidence concerning it should not have been admitted at their trial. Pp. 220–222.

219 Tenn. 472, 410 S. W. 2d 881, reversed and remanded.

Michael H. Gottesman argued the cause for petitioners. With him on the briefs were *Bernard Kleiman, Elliot Bredhoff, George H. Cohen, George Longshore,* and *Tom J. Taylor.*

Allen H. Carter argued the cause for respondent. With him on the brief were *Foster D. Arnett* and *S. Randolph Ayres.*

MR. JUSTICE WHITE delivered the opinion of the Court.

Petitioners, Wayne Dyke, Ed McKinney, and John Blackwell, were found guilty of criminal contempt by the Chancery Court of McMinn County, Tennessee. All three were given the maximum sentence authorized by statute, 10 days in jail and a $50 fine.[1] The Tennessee Supreme Court affirmed,[2] rejecting contentions that the convictions violated the Federal Constitution because a jury trial was denied[3] and because testimony concerning

[1] Tenn. Code Ann. § 23–903 (1955): "The punishment for contempt may be by fine or imprisonment, or both; but where not otherwise specially provided, the circuit, chancery, and appellate courts are limited to a fine of fifty dollars ($50.00), and imprisonment not exceeding ten (10) days, and all other courts are limited to a fine of ten dollars ($10.00)."

[2] *Sub nom. Taylor Implement Mfg. Co., Inc.* v. *United Steelworkers of America,* 219 Tenn. 472, 410 S. W. 2d 881 (1966), rehearing denied, 219 Tenn. 481, 410 S. W. 2d 885 (1967).

[3] This claim by petitioners is based on the Fourteenth Amendment, and respondent calls our attention to the fact that at trial and on appeal to the Tennessee Supreme Court petitioners pointed only to specific Bill of Rights provisions. The opinion below demonstrates that the Tennessee Supreme Court considered and rejected the contention that the Fourteenth Amendment and the Sixth Amendment, taken together, required that petitioners be given a jury trial. We have frequently held that a party is not

a gun, allegedly discovered during an unconstitutional search, was admitted at trial. Petitioners raised both challenges in their petition for a writ of certiorari, and we granted the writ. 389 U. S. 815 (1967).

In connection with a labor dispute, McMinn County Chancery Court issued, on January 24, 1966, an injunction against, *inter alia*,

> "inflicting harm or damage upon the persons or property of [respondent Taylor Implement Company's] employees, customers, visitors or any other persons."

On the night of February 25, 1966, a car was seen to drive past the home of Lloyd Duckett, a nonstriking Taylor Implement employee who lived in Monroe County, which adjoins McMinn. Shots were fired from the car at or into the Duckett home. Robert Wayne Ellis, Duckett's son-in-law, was standing in the front yard with another son-in-law, Dale Harris; Ellis fired back at the car with a pistol, and thought his first shot hit the back of the car. Ellis informed Monroe County Sheriff Howard Kirkpatrick by telephone, and soon after, Monroe Deputy Sheriff Loyd Powers, contacted by Kirkpatrick on his radio and presumably told of the crime, spotted a suspicious car and began following it. The car raced away but was stopped by Athens, Tennessee, policemen, notified by Powers of a speeding car heading for Athens. When Powers reached the stopped car, which contained the three petitioners, he and the Athens policemen took them to McMinn County jail,[4]

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barred by failure to cite below the proper constitutional provisions when the lower courts consider the relevant provisions. *E. g., Braniff Airways, Inc.* v. *Nebraska State Bd. of Equalization and Assessment*, 347 U. S. 590, 598–599 (1954); *Gibbs* v. *Burke*, 337 U. S. 773, 779 (1949).

[4] The record suggests that petitioners were told they were under arrest for reckless driving.

and parked their car outside the jail. While petitioners were waiting inside the jail, Powers and several Athens policemen searched the car. Under the front seat they found an air rifle. At trial there was testimony that Ellis and Harris had recognized the car from which shots were fired as a two-tone 1960 or 1961 Dodge, that Ellis thought he hit the back of the Dodge with one shot, that the car stopped in Athens was a 1960 Dodge with a fresh bullet hole through the trunk lid, that an air rifle pellet was found the next day outside the Duckett home, and that an air rifle was found under the car's seat.[5] The chancellor noted that the case against petitioners was "premised entirely upon circumstantial evidence" but that nonetheless he had "no trouble at all with the proof which I have heard and I have weighed it in its severest form, that the charges made must be proven beyond a reasonable doubt." The three petitioners were found guilty.

Petitioners' first claim is that the Fourteenth Amendment was violated when their request for trial by jury was denied. We have held today, in *Duncan* v. *Louisiana, ante,* p. 145, that the Fourteenth Amendment imposes upon the States the requirement of Article III and the Sixth Amendment that jury trials be available to criminal defendants. We have also held, in *Bloom* v. *Illinois, ante,* p. 194, that prosecutions for criminal contempt are within the constitutional guarantee. The *Bloom* and *Duncan* cases, however, have reaffirmed the view that the guarantee of jury trial does not extend to petty crimes. As *Bloom* makes clear, *supra,* at 195–200, criminal contempt has always been thought not to be a crime of the sort that requires a jury trial regardless of the penalty authorized. Alleged criminal contemnors

[5] The air rifle itself was not introduced. The trial judge treated it as "filed and withdrawn."

must be given a jury trial, therefore, unless the legislature has authorized a maximum penalty within the "petty offense" limit or, if the legislature has made no judgment about the maximum penalty that can be imposed, unless the penalty actually imposed is within that limit. This Court has not had occasion to state precisely where the line falls between punishments that can be considered "petty" and those that cannot be. From *Cheff* v. *Schnackenberg,* 384 U. S. 373 (1966), it is clear that a six-month sentence is short enough to be "petty." That holding is sufficient for resolution of this case. Here the maximum penalty which Tennessee statutes permitted the chancellor to impose was 10 days in jail and a fine of $50. The contempt was therefore a "petty offense," and petitioners had no federal constitutional right to a jury trial.

Petitioners next contend that admission at trial, over timely objection, of evidence concerning the discovery of an air rifle under the seat of the car in which they were riding when arrested violated the Fourth and Fourteenth Amendments. The State concedes that the search was without a warrant, but asserts that it was not in violation of the Constitution because "reasonable." While the record is not entirely clear, petitioners appear to have been arrested for reckless driving. Whether or not a car may constitutionally be searched "incident" to arrest for a traffic offense, the search here did not take place until petitioners were in custody inside the courthouse and the car was parked on the street outside. *Preston* v. *United States,* 376 U. S. 364 (1964), holds that under such circumstances a search is "too remote in time or place to [be] incidental to the arrest . . . ." 376 U. S., at 368.

The search in question here is not saved by *Cooper* v. *California,* 386 U. S. 58 (1967), which upheld a warrantless search of a car impounded "as evidence" pur-

suant to a state statute. The police there were required to seize the car and to keep it until forfeiture proceedings could be completed. In those circumstances, said the Court, "[i]t would be unreasonable to hold that the police, having to retain the car in their custody for such a length of time, had no right, even for their own protection, to search it." 386 U. S., at 61–62. In the instant case there is no indication that the police had purported to impound or to hold the car, that they were authorized by any state law to do so, or that their search of the car was intended to implement the purposes of such custody. Here the police seem to have parked the car near the courthouse merely as a convenience to the owner, and to have been willing for some friend or relative of McKinney (or McKinney himself if he were soon released from custody) to drive it away. The reasons that made the warrantless search in *Cooper* reasonable thus do not apply to the search here. The Court discussed in *Cooper*, 386 U. S., at 61, the reasons why that case was distinguishable from *Preston*. The case before us is like *Preston* and unlike *Cooper* according to each of the distinguishing tests set forth in the *Cooper* opinion.

Automobiles, because of their mobility, may be searched without a warrant upon facts not justifying a warrantless search of a residence or office. *Brinegar* v. *United States*, 338 U. S. 160 (1949); *Carroll* v. *United States*, 267 U. S. 132 (1925). The cases so holding have, however, always insisted that the officers conducting the search have "reasonable or probable cause" to believe that they will find the instrumentality of a crime or evidence pertaining to a crime before they begin their warrantless search. The record before us does not contain evidence that Sheriff Kirkpatrick, Deputy Sheriff Powers, or the officers who assisted in the search had reasonable or probable cause to believe that evidence

would be found in petitioners' car. Powers had not been told that Harris and Ellis had identified the car from which shots were fired as a 1960 or 1961 Dodge. He testified:

> "All I got is just that it would be an old make model car. Kinda old make model car."

The record also contains no suggestion that Ellis told Sheriff Kirkpatrick, Deputy Sheriff Powers, or any other law enforcement official that he had fired at the Dodge or that he thought he had hit it with one bullet. As far as this record shows, Powers knew only that the car he chased was "an old make model car," that it speeded up when he chased it, and that it contained a fresh bullet hole. The evidence placed upon the record is insufficient to justify a conclusion that McKinney's car was searched with "reasonable or probable cause" to believe the search would be fruitful.

Since the search was not shown to have been based upon sufficient cause, we need not reach the question whether *Carroll* and *Brinegar, supra,* extend to a warrantless search, based upon probable cause, of an automobile which, having been stopped originally on a highway, is parked outside a courthouse.

Because evidence was admitted without a satisfactory showing that it was obtained in compliance with the Fourth and Fourteenth Amendments, the judgment below is reversed and the case is remanded to the Tennessee Supreme Court for disposition not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, concurring.

I concur in the judgment in this case, and in that part of the Court's opinion dealing with the admission at petitioners' trial of evidence produced by an unlawful search.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, dissenting.

The Court holds in this case, as it said in dictum in *Bloom* v. *Illinois, ante,* p. 194, that persons charged with so-called "petty" crimes are not entitled to trial by jury. I am not as sure as the Court seems to be that this classification should be used to deprive a criminal defendant of a jury trial. See my dissenting opinion in *Green* v. *United States,* 356 U. S. 165, 193–219. The word "petty" has no exact meaning, and until it is given a better definition than that which the Court gives to it today, I do not desire to condemn the right to trial by jury to such an uncertain fate. See *Cheff* v. *Schnackenberg,* 384 U. S. 373, 384–393 (dissenting opinion). My Brother HARLAN's dissent in *Duncan* v. *Louisiana, ante,* p. 171, points out that whippings, even where 31 lashes were inflicted, were classified as petty crimes. And the Court here states that six months' punishment is petty. I am loath to hold whippings or six months' punishment as "petty." And here, where the offense is punishable by a $50 fine and 10 days in jail behind bars, I feel the same way. Even though there be some offenses that are "petty," I would not hold that this offense falls in that category. See my dissenting opinion in *United States* v. *Barnett,* 376 U. S. 681, 727. Since I would reverse and remand this case for a trial by jury, I do not find it necessary to consider the other questions decided by the Court.

JOINT INDUSTRY BOARD OF THE ELECTRICAL INDUSTRY ET AL. *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 616. Argued March 25, 1968.—Decided May 20, 1968.

An employer's unpaid contributions to an employees' annuity plan established by a collective bargaining contract are not entitled to a priority under § 64a (2) of the Bankruptcy Act, which grants priority, limited to $600 and to wages earned within three months before commencement of bankruptcy proceedings, to "wages . . . due to workmen." *United States* v. *Embassy Restaurant, Inc.*, 359 U. S. 29 (1959), followed. Pp. 225–229.

379 F. 2d 211, affirmed.

Harold Stern argued the cause for petitioners. With him on the brief for petitioner Joint Industry Board of the Electrical Industry was *Norman Rothfeld*. *Max Schwartz* filed a brief for petitioner Trustee in Bankruptcy of A & S Electric Corp.

Lawrence G. Wallace argued the cause for the United States. On the brief were *Solicitor General Griswold*, *Assistant Attorney General Rogovin*, *Harris Weinstein*, and *Crombie J. D. Garrett*.

J. Albert Woll, *Laurence Gold*, and *Thomas E. Harris* filed a brief for the American Federation of Labor and Congress of Industrial Organizations, as *amicus curiae*, urging reversal.

MR. JUSTICE WHITE delivered the opinion of the Court.

Section 64a (2) of the Bankruptcy Act, 30 Stat. 563, 11 U. S. C. § 104 (a)(2), grants priority over the claims of other creditors to "wages . . . due to workmen, . . ." the priority being limited to $600 and to wages earned within three months before the commence-

ment of the proceedings.[1] The question before us is whether priority under § 64a (2) must be accorded to an employer's unpaid contributions to an employees' annuity plan established by a collective bargaining contract. The referee and the District Court denied the priority and the Court of Appeals affirmed. *In re A & S Electric Corp.*, 379 F. 2d 211 (C. A. 2d Cir. 1967). We granted certiorari, *sub nom. Joint Industry Board of the Electrical Industry* v. *United States*, 389 U. S. 969 (1967). We affirm the judgment.

The Annuity Plan of the Electrical Industry in New York City was established by a collective bargaining agreement between Local Union No. 3, International Brotherhood of Electrical Workers, AFL–CIO, and four associations of electrical contractors. The plan covers all employees in the bargaining unit represented by the union and is funded by employer contributions of "Four Dollars ($4.00) per day for each day worked or each holiday for which payment is received by his employees . . . ." Payments are made to trustees who are empowered to collect and administer the contributions under the provisions of the plan. These trustees are the petitioners here. Contributions received by the

[1] Section 64a, 30 Stat. 563 (as amended by Act of June 22, 1938, 52 Stat. 874, and Act of July 30, 1956, 70 Stat. 725), 11 U. S. C. § 104 (a), provides in relevant part:

"The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be . . . (2) wages and commissions, not to exceed $600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, due to workmen, servants, clerks, or traveling or city salesmen on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt; and for the purposes of this clause, the term 'traveling or city salesman' shall include all such salesmen, whether or not they are independent contractors selling the products or services of the bankrupt on a commission basis, with or without a drawing account or formal contract . . . ."

trustees are credited to the account of the individual employees but are "payable to him only as hereinafter provided," namely, upon death, retirement from the industry at age 60, permanent disability, entry into the Armed Forces, or ceasing to be a participant under the plan. Death benefits are paid only out of income, if available, and other benefits, though they may be payable in installments, will at a minimum return to the employee the total of the contributions credited to his name, without interest.

A & S Electric Corporation, an employer liable for contributions to the annuity plan, was adjudicated a bankrupt in 1963. The Joint Industry Board filed a claim which included $5,114 representing payments under the plan which fell due but were unpaid during the three months prior to the commencement of the proceedings. Priority for this amount was asserted under § 64a (2). The United States, with a fourth-class priority claim for unpaid taxes, objected to the allowance of the Joint Board's priority claim. The referee and the courts agreed with the United States, holding that payments due to the Joint Board were not wages due to workmen, relying for this conclusion principally upon *United States* v. *Embassy Restaurant, Inc.*, 359 U. S. 29 (1959).

We agree that *Embassy Restaurant* controls this case. There the claim was for unpaid employer contributions to a welfare fund, the contributions being $8 per month for each full-time employee; the fund provided life insurance, weekly sick benefits, hospital and surgical payments, and other advantages for covered employees. That claim, the Court held, was not entitled to § 64a (2) priority because payments to such a welfare fund did not satisfy the manifest purpose of the priority, which was "to enable employees displaced by bankruptcy to secure, with some promptness, the money directly due to them in back wages, and thus to alleviate

in some degree the hardship that unemployment usually brings to workers and their families." 359 U. S., at 32.[2] The contributions involved there were payable to trustees, not to employees, and were disbursable to employees only on the occurrence of certain events, not including the bankruptcy of the employer. Neither the contributions nor the plan provided any immediate support for workmen during the period of financial distress.

The case before us concerns employer contributions to the welfare fund which are similarly not due the employees and never were; they were payable only to the trustees, who had the exclusive right to hold and manage the fund. Though the contributions were credited to individual employee accounts, nothing was payable to employees except upon the occurrence of certain events. Until death, retirement after age 60, permanent disability, entry into military service, or cessation of participation under the plan, no benefits were payable. Further, as the referee pointed out, the employee could not assign, pledge, or borrow against the contributions, or otherwise use them as his own.[3] Quite obviously the annuity fund was not intended to relieve the distress of temporary un-

[2] The cases in the lower courts are in agreement as to the purpose of § 64a (2). See 3 Collier on Bankruptcy ¶ 64.201, at 2112, nn. 7–9 and related text (14th ed., 1967).

[3] The plan also provides that no person claiming by or through any participant shall have any right, title, or interest in or to the annuity fund. Section 9 (f) of the plan imposes additional limitations: "The benefits payable to Participants or beneficiaries under this Plan cannot be assigned and shall not be liable to attachment, garnishment or other process, and shall not be taken, appropriated or applied by any legal or equitable process, or by operation of law, to pay any debt or liability of the Participant or of any beneficiary or next-of-kin who may have a right thereunder, either before or after payment."

It seems agreed in this case that the employer contributions to the fund are not taxable to the employee at the time they are made, but only when later received as benefits.

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employment, whether arising from the bankruptcy of the employer or for some other reason. Hence, if *Embassy Restaurant* is to be followed, the unpaid contributions in this case do not satisfy the fundamental purpose of the § 64a (2) priority for wages due to workmen.

Nor are we inclined to overrule *Embassy Restaurant*'s construction of § 64a (2). This is a matter more appropriately left to the Congress, which has not infrequently given attention to § 64a of the Bankruptcy Act and to the priorities it creates.[4] The latest amendments to § 64a occurred in 1966, in the Acts of July 5, 1966, 80 Stat. 268 and 80 Stat. 271. Although the section was completely re-enacted in 1967,[5] § 64a (2) was left unchanged despite the fact that in every Congress since *Embassy Restaurant* bills have been introduced to overrule or modify the result reached in that case.[6]

Despite the general policy of the Bankruptcy Act to distribute assets of the estate equally to creditors, the priorities established in § 64a give priority to wages due workmen up to $600 if earned within three months prior to bankruptcy. Other unpaid wages are allowable as general claims but are not entitled to priority. If delinquent contributions to welfare and annuity funds providing deferred benefits to employees were to have equal priority with wages payable directly to employees, the maximum payable immediately and directly to employees would be reduced whenever individual wage

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[4] The history of § 64a (2) is dealt with in both the majority and dissenting opinions in *United States* v. *Embassy Restaurant*, 359 U. S. 29 (1959). For a more complete consideration see 3 Collier on Bankruptcy ¶¶ 64.01, 64.201 (14th ed., 1967).

[5] Act of November 28, 81 Stat. 511.

[6] H. R. 2076, 90th Cong., 1st Sess. (1967); H. R. 991, 89th Cong., 1st Sess. (1965); H. R. 1784, 88th Cong., 1st Sess. (1963); H. R. 66, 88th Cong., 1st Sess. (1963); H. R. 2274, 87th Cong., 1st Sess. (1961); and H. R. 9831, 86th Cong., 2d Sess. (1960).

claims approached $600 or whenever the assets of the estate would not permit all wage claims to be paid in full. Also, increasing the amounts payable to second priority creditors would reduce the assets available for distribution to lower priority claimants and general creditors, including wage claimants not entitled to priority.[7] *Embassy Restaurant* was decided nine years ago. If there is still any question as to whether claims for unpaid contributions to provide deferred benefits to employees should share the assets of bankrupts with general creditors or should be entitled to the limited priority granted wages due to workmen, any new resolution of that question should come from Congress.

Affirmed.

MR. JUSTICE FORTAS, with whom THE CHIEF JUSTICE and MR. JUSTICE BRENNAN join, dissenting.

I do not agree that *United States* v. *Embassy Restaurant, Inc.*, 359 U. S. 29 (1959), controls this case. I believe the employer's unpaid contributions to the employees' annuity plan are "wages . . . due to workmen" within § 64a (2) of the Bankruptcy Act. Those contributions accrued and unpaid within three months before the commencement of the bankruptcy proceedings are entitled to the statutory priority.

In this case, the employees and the employer agreed, in a collective bargaining agreement, that the employer would compensate each employee with stipulated wages and, additionally, $4 per day "for each day worked or each holiday . . . ." The latter sum, instead of being

[7] It is instructive that workmen's compensation claims were not provable in bankruptcy until 1934, when they were given a seventh priority. In 1938 the priority for compensation claims was abolished. Moreover, taxes and Social Security contributions which are withheld from wages are entitled to a fourth priority as taxes rather than a second priority as wages.

paid directly to the employees, was remitted to trustees of an annuity plan. In the accounts of the plan, the sum remitted for each employee, and measured by his days of work, was credited to that employee. The employee was entitled to receive the sum credited to his account upon retirement from the industry at age 60, death, permanent disability, entrance into the Armed Forces, or ceasing to be a participant under the plan by leaving the electrical industry or by accepting employment with some electrical company that is not covered by the collective bargaining agreement.

It is unmistakably clear (1) that the sums in question were to be paid as part of the wage bargain between employer and employee; (2) that the sum due each employee was specifically related to and measured by his work; (3) that the sum which each employee earned was accounted for separately and individually; he was entitled to the amount paid to the trustee on account of his individual labor; and (4) that inevitably, as sure as death, there was to come a point of time when the sum remitted to the trustee on account of each individual's work would be paid to that individual or his heirs.

In my judgment, it is impossible to distinguish, on the basis of the purpose of the priority provisions of the Bankruptcy Act, between these payments to the annuity plan and direct payments to the employee for his labors. The Court, however, holds that payments to the plan do not satisfy the "manifest purpose of the priority," as that purpose was explained in *Embassy Restaurant*. This purpose, the Court says, was to enable employees, upon the bankruptcy of their employer, promptly to secure money directly due them in back wages and thereby to alleviate the hardship that unemployment brings. *Embassy Restaurant* demonstrates, the Court says, that since the contributions to the annuity plan were not immediately payable to the em-

ployees upon bankruptcy, they do not fall within the definition of "wages" for priority purposes.

But the present case is materially different from *Embassy Restaurant*. In that case, the employee was never entitled to receive the sums which were paid into the fund on account of his labor. These sums and the sums paid by the employer for all other employees were used to provide life insurance, sick benefits, hospital and surgical payments, and other benefits. An employee was never entitled to demand and receive payment of sums that he had earned. These sums were not credited to him to be paid upon his death or retirement or other contingencies.

In a dissenting opinion in that case, MR. JUSTICE BLACK (joined by THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS) argued that the majority misconceived the nature of the payments into the fund in *Embassy Restaurant* and the purpose of the priority for wages. But we need not quarrel with the Court's conclusions in *Embassy Restaurant*, for purposes of the present case. Here, it is entirely clear that the sums paid and payable into the fund were payable to the individual employee. They were his. They were part of his wages. Only the time of receipt was deferred until retirement at age 60, separation from the industry, death, etc.

There is nothing whatever in § 64 to indicate, as the Court would have us believe, that "wages" lose their priority position if they are not immediately payable upon the event of bankruptcy. There is no basis whatever, except this Court's *ipse dixit* in this case, to say that the priority is available only to provide "*immediate* support for workmen during the period of financial distress." *Embassy Restaurant* is not authority for this. *Embassy Restaurant* is authority for the proposition that when the "wages" are never payable to the employee, but benefit him only through providing life insurance or

various types of services, the priority is not applicable. That is not the present case.

I take it that the purpose of the "wages" priority—just as in the case of all other priorities—is to give a preferred status to claims deemed particularly meritorious, so that the chances that the claimant will recover the sums due him on such claims will be enhanced. "Wages . . . due to workmen" are in this category, as are other claims such as costs of administering the bankruptcy estate and taxes owed to the United States or any State. The lower court cases which the majority claims are "in agreement" as to the purpose of the "wages" priority [1] are probably not in agreement with each other at all and certainly not in agreement with the majority's restrictive definition of that purpose. *In re Lawsam Electric Co., Inc.*, 300 F. 736 (D. C. N. Y.), Judge Learned Hand said: "The statute was intended to favor those who could not be expected to know anything of the credit of their employer, but must accept a job as it comes, to whom the personal factor in employment is not a practicable consideration." *In re Estey*, 6 F. Supp. 570 (D. C. N. Y.), it was said that "the intention of Congress was plainly to give special protection to a class of wage-earners who generally have no substantial savings or other reserves to fall back on in case of adversity and therefore cannot afford to lose." Certainly neither of these statements, which the majority cites in support of its definition of the purpose of the "wages" priority, constitutes authority for the proposition that the priority was intended only to alleviate the hardship caused by unemployment following immediately upon the bankruptcy of an employer. As a matter of fact, recognizing the priority does not assure immediate payment. Payment is made upon interim or

[1] See *ante*, at 227, n. 2.

final distribution of the estate. Priority merely increases the prospects of recovery.[2]

The Court's decision in this case, in my opinion, deprives the workers here concerned of the protection which Congress accorded their claims. We should reverse the judgment below.

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[2] Even if I were to accept the majority's definition of the purpose of the "wages" priority, I still could not agree with the decision to affirm. For the majority indulges in a major, unexplained, assumption with which I do not agree: the majority assumes, without any basis that I can find in the record or anywhere else, that upon the bankruptcy of an employer an employee is likely to suffer the hardship of unemployment yet unlikely to suffer the hardship of accepting a job outside the electrical industry or with an employer who is not covered by the collective bargaining contract and annuity plan. Of course, if an employee does choose, upon the bankruptcy of his employer, to seek work with an employer not covered by the contract, he ceases to participate in the annuity plan and may, under the terms of that plan, claim the monies that have accrued in his account. In this plausible and, I would suspect, common situation, the employee receives his annuity account "immediately" after the bankruptcy. I see no significant difference—and certainly the majority suggests none—between payments that may alleviate the hardship of unemployment caused by bankruptcy and payments that may alleviate the hardship of unattractive employment after a discharge caused by bankruptcy.

CARAFAS *v.* LaVALLEE, WARDEN.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 71. Argued March 27, 1968.—Decided May 20, 1968.

In 1960 petitioner was convicted in New York state criminal proceedings and his sentence was affirmed on appeal without opinion over his contention that illegally obtained evidence had been introduced against him at his trial. Renewing that claim, petitioner thereafter sought relief in the federal and state courts by writ of habeas corpus. The petition in the present case was filed in June 1963, while petitioner was in custody. On November 5, 1965, the District Court, after a hearing on the merits ordered by the Court of Appeals, dismissed the petition. The District Court issued a certificate of probable cause. A notice of appeal was filed, and the petitioner made application in the Court of Appeals for an order allowing him to appeal *in forma pauperis*. The State opposed the application and moved to dismiss the appeal as without merit. Petitioner, replying, opposed the motion to dismiss and renewed his application for leave to appeal *in forma pauperis*. The Court of Appeals entered the following order with respect thereto: "Application for Leave to Proceed *in Forma Pauperis*. Application denied. Motion to dismiss appeal granted." On March 6, 1967, about two weeks after the Court of Appeals denied a rehearing, petitioner's sentence expired and he was released from custody. On March 20, 1967, petitioner filed a petition for a writ of certiorari in this Court, which was granted October 16, 1967. Respondent contends that expiration of petitioner's sentence has mooted the case and that in any event petitioner was not wrongfully denied a full appeal by the Court of Appeals after the District Court had granted a certificate of probable cause. *Held:*

1. The case is not moot. Pp. 237–240.

(a) Because of the "disabilities or burdens [which] may flow from" petitioner's conviction, he has "a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him." *Fiswick* v. *United States*, 329 U. S. 211, 222 (1946). Pp. 237–238.

(b) Under the federal habeas corpus statutory scheme, once federal jurisdiction has attached in the District Court, it is not

defeated by petitioner's release before completion of the proceedings on the application. Though the federal habeas corpus statute requires that the applicant be "in custody" when the habeas corpus application is filed, the relief that may be granted is not limited to discharging the applicant from physical custody, the statute providing that "the court shall . . . dispose of the matter as law and justice require." 28 U. S. C. § 2243. *Parker* v. *Ellis*, 362 U. S. 574 (1960), overruled. Pp. 238–240.

2. Where a certificate of probable cause has been granted, the court of appeals must allow an appeal *in forma pauperis* (assuming a requisite showing of poverty), must consider the appeal on its merits, and must include in its order enough to demonstrate the basis for its action, as this Court held in *Nowakowski* v. *Maroney*, 386 U. S. 542. That case, though decided after the Court of Appeals' summary dismissal of petitioner's appeal, governs this case which had not been concluded at the time of that decision. Pp. 240–242.

Vacated and remanded.

James J. Cally argued the cause and filed briefs for petitioner.

Brenda Soloff, Assistant Attorney General of New York, argued the cause for respondent. With her on the brief were *Louis J. Lefkowitz*, Attorney General, *Samuel A. Hirshowitz*, First Assistant Attorney General, and *Michael H. Rauch*, Assistant Attorney General.

Mr. Justice Fortas delivered the opinion of the Court.

This case has a lengthy procedural history. In 1960, petitioner was convicted of burglary and grand larceny in New York state court proceedings and was sentenced to concurrent terms of three to five years. On direct appeal (following *Mapp* v. *Ohio*, 367 U. S. 643 (1961)), petitioner claimed that illegally obtained evidence had been introduced against him at trial. The Appellate Division affirmed the conviction without opinion, *People* v. *Carafas*, 14 App. Div. 2d 886, 218 N. Y. S. 2d 536 (1961), as did the New York Court of Appeals, 11 N. Y. 2d 891, 182 N. E.

2d 413 (1962).[1] This Court denied a petition for a writ of certiorari. 372 U. S. 948 (1963).

Thereafter, complex proceedings took place in which petitioner sought in both federal and state courts to obtain relief by writ of habeas corpus, based on his claim that illegally seized evidence was used against him. 334 F. 2d 331 (1964); petition for writ of certiorari denied, 381 U. S. 951 (1965). On November 5, 1965, the United States District Court, as directed by the United States Court of Appeals for the Second Circuit (334 F. 2d 331 (1964)), heard petitioner's claim on the merits. It dismissed his petition on the ground that he had failed to show a violation of his Fourth Amendment rights. Petitioner appealed in circumstances hereinafter related. The Court of Appeals for the Second Circuit dismissed the appeal. On March 20, 1967, a petition for a writ of certiorari was filed here. We granted the petition, 389 U. S. 896 (1967), to consider whether, because of facts to which we later refer, the Court of Appeals' dismissal conformed to our holding in *Nowakowski* v. *Maroney*, 386 U. S. 542 (1967). But first we must consider the State's contention that this case is now moot because petitioner has been unconditionally released from custody.

Petitioner applied to the United States District Court for a writ of habeas corpus in June 1963. He was in custody at that time. On March 6, 1967, petitioner's sentence expired,[2] and he was discharged from the parole status in which he had been since October 4, 1964. We issued our writ of certiorari on October 16, 1967 (389 U. S. 896).

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[1] The New York Court of Appeals amended its remittitur to reflect that it had passed on petitioner's constitutional claim. 11 N. Y. 2d 969, 183 N. E. 2d 697 (1962).

[2] It appears that petitioner was on bail after conviction until this Court denied his earlier petition for a writ of certiorari. 372 U. S. 948 (March 18, 1963).

The issue presented, then, is whether the expiration of petitioner's sentence, before his application was finally adjudicated and while it was awaiting appellate review, terminates federal jurisdiction with respect to the application. Respondent relies upon *Parker* v. *Ellis*, 362 U. S. 574 (1960), and unless this case is overruled, it stands as an insuperable barrier to our further consideration of petitioner's cause or to the grant of relief upon his petition for a writ of habeas corpus.

Parker v. *Ellis* held that when a prisoner was released from state prison after having served his full sentence, this Court could not proceed to adjudicate the merits of the claim for relief on his petition for habeas corpus which he had filed with the Federal District Court. This Court held that upon petitioner's unconditional release the case became "moot." *Parker* was announced in a *per curiam* decision.[3]

It is clear that petitioner's cause is not moot. In consequence of his conviction, he cannot engage in certain businesses;[4] he cannot serve as an official of a labor union for a specified period of time;[5] he cannot vote in any election held in New York State;[6] he cannot serve as a juror.[7] Because of these "disabilities or burdens [which] may flow from" petitioner's conviction, he has "a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him." *Fiswick* v. *United States*, 329 U. S. 211, 222 (1946). On account of these "collateral consequences,"[8] the case is

[3] THE CHIEF JUSTICE and JUSTICES BLACK, DOUGLAS, and BRENNAN dissented.

[4] *E. g.*, New York Education Law §§ 6502, 6702; New York General Business Law § 74, subd. 2; New York Real Property Law § 440–a; New York Alcoholic Beverage Control Law § 126.

[5] 73 Stat. 536, 29 U. S. C. § 504.

[6] New York Election Law § 152, subd. 2.

[7] New York Judiciary Law §§ 596, 662.

[8] Undoubtedly there are others. See generally Note, Civil Disabilities of Felons, 53 Va. L. Rev. 403 (1967).

not moot. *Ginsberg* v. *New York*, 390 U. S. 629, 633–634, n. 2 (1968); *Fiswick* v. *United States*, *supra*, at 222, n. 10; *United States* v. *Morgan*, 346 U. S. 502, 512–513 (1954).

The substantial issue, however, which is posed by *Parker* v. *Ellis*, is not mootness in the technical or constitutional sense, but whether the statute defining the habeas corpus jurisdiction of the federal judiciary in respect of persons in state custody is available here. In *Parker* v. *Ellis*, as in the present case, petitioner's application was filed in the Federal District Court when he was in state custody, and in both the petitioner was unconditionally released from state custody before his case could be heard in this Court. For the reasons which we here summarize and which are stated at length in the dissenting opinions in *Parker* v. *Ellis*, we conclude that under the statutory scheme, once the federal jurisdiction has attached in the District Court, it is not defeated by the release of the petitioner prior to completion of proceedings on such application.

The federal habeas corpus statute requires that the applicant must be "in custody" when the application for habeas corpus is filed. This is required not only by the repeated references in the statute,[9] but also by the history of the great writ.[10] Its province, shaped to guarantee the most fundamental of all rights,[11] is to provide an effective and speedy instrument by which judicial inquiry may be had into the legality of the detention of a person. See *Peyton* v. *Rowe*, *ante*, p. 54.[12]

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[9] See 28 U. S. C. §§ 2241, 2242, 2243, 2244, 2245, 2249, 2252, 2254.

[10] See 9 W. Holdsworth, History of English Law 108–125 (1926).

[11] *E. g.*, Article 39 of the Magna Carta (see 9 W. Holdsworth, at 112–125). The federal habeas corpus statute grants jurisdiction to inquire into violations of the United States Constitution.

[12] If there has been, or will be, an unconditional release from custody before inquiry can be made into the legality of detention, it has been held that there is no habeas corpus jurisdiction. See

But the statute does not limit the relief that may be granted to discharge of the applicant from physical custody. Its mandate is broad with respect to the relief that may be granted. It provides that "[t]he court shall . . . dispose of the matter as law and justice require." 28 U. S. C. § 2243. The 1966 amendments to the habeas corpus statute seem specifically to contemplate the possibility of relief other than immediate release from physical custody. At one point, the new § 2244 (b) (1964 ed., Supp. II) speaks in terms of "release from custody or other remedy." See *Peyton* v. *Rowe, supra; Walker* v. *Wainwright,* 390 U. S. 335 (1968). Cf. *Ex parte Hull,* 312 U. S. 546 (1941).

In the present case, petitioner filed his application shortly after June 20, 1963, while he was in custody. He was not released from custody until March 6, 1967, two weeks before he filed his petition for certiorari here. During the intervening period his application was under consideration in various courts. Petitioner is entitled to consideration of his application for relief on its merits. He is suffering, and will continue to suffer, serious disabilities because of the law's complexities and not because of his fault, if his claim that he has been illegally convicted is meritorious. There is no need in the statute, the Constitution, or sound jurisprudence for denying to petitioner his ultimate day in court.

This case illustrates the validity of THE CHIEF JUSTICE's criticism that the doctrine of *Parker* simply aggravates the hardships that may result from the "intolerable delay[s] in affording justice." *Parker* v. *Ellis, supra,* at 585 (dissenting opinion). The petitioner in this case was sentenced in 1960. He has been attempting to liti-

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Parker v. *Ellis, supra,* at 582, n. 8 (WARREN, C. J., dissenting); *Ex parte Baez,* 177 U. S. 378 (1900); *United States ex rel. Rivera* v. *Reeves,* 246 F. Supp. 599 (D. C. S. D. N. Y. 1965); *Burnett* v. *Gladden,* 228 F. Supp. 527 (D. C. D. Ore. 1964).

gate his constitutional claim ever since. His path has been long—partly because of the inevitable delays in our court processes and partly because of the requirement that he exhaust state remedies.[13] He should not be thwarted now and required to bear the consequences of assertedly unlawful conviction simply because the path has been so long that he has served his sentence.[14] The federal habeas corpus statute does not require this result, and *Parker* v. *Ellis* must be overruled.

We turn now to the substance of the question as to which we granted certiorari. Petitioner's first hearing on the merits in the Federal District Court was held on November 5, 1965.[15] The District Court dismissed the petition for habeas corpus, denying petitioner's claim that evidence used against him had been obtained by an illegal search and seizure. The District Court issued a

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[13] Petitioner was convicted in 1960. He took his case through the state appellate process, and this Court denied a writ of certiorari in March 1963. 372 U. S. 948. In June 1963 petitioner began his quest for a writ of habeas corpus in the federal courts. The District Court denied the petition without prejudice, suggesting, in view of what the judge thought was the unsettled state of New York law, that petitioner reapply to the state courts. See 28 U. S. C. § 2254. Petitioner did so, and apparently at the same time appealed to the United States Court of Appeals for the Second Circuit. The state courts denied relief a second time. The United States Court of Appeals reversed the District Court and ordered a hearing on the merits. 334 F. 2d 331 (1964). This Court denied the State's petition for a writ of certiorari. 381 U. S. 951 (1965). The hearing ordered by the Court of Appeals was held by the District Court on November 5, 1965. The petition was dismissed on the merits on May 2, 1966. Petitioner's appeal to the Second Circuit was dismissed on February 3, 1967, and a petition for rehearing was denied on February 21, 1967. A petition for a writ of certiorari was filed here on March 20, 1967, and granted on October 16, 1967, 389 U. S. 896, about seven years after petitioner's conviction.

[14] See *Thomas* v. *Cunningham*, 335 F. 2d 67 (C. A. 4th Cir. 1964).

[15] See n. 13, *supra*.

certificate of probable cause pursuant to 28 U. S. C. § 2253 and ordered that the notice of appeal be filed without prepayment of the prescribed fee. A notice of appeal was filed, and the petitioner applied in the Court of Appeals for an order allowing him to appeal *in forma pauperis*. 28 U. S. C. § 1915. The State opposed petitioner's application for leave to appeal *in forma pauperis* and moved to dismiss the appeal on the ground that it was without merit. Petitioner filed a reply in July 1966 in which he opposed the State's motion to dismiss and in which he renewed his plea for leave to appeal *in forma pauperis*. On February 3, 1967, the Court of Appeals entered the following order: "Application for Leave to Proceed *in Forma Pauperis*. Application denied. Motion to dismiss appeal granted." Rehearing was thereafter denied. It is this action of the Court of Appeals that brings into issue our decision in *Nowakowski* v. *Maroney*, 386 U. S. 542 (April 10, 1967).

In *Nowakowski*, we held that "when a district judge grants . . . a certificate [of probable cause], the court of appeals must grant an appeal *in forma pauperis* (assuming the requisite showing of poverty), and proceed to a disposition of the appeal in accord with its ordinary procedure." At 543. Although *Nowakowski* was decided after the Court of Appeals dismissed petitioner's appeal, its holding applies to a habeas corpus proceeding which, like this one, was not concluded at the time *Nowakowski* was decided. Cf. *Eskridge* v. *Washington Prison Board*, 357 U. S. 214 (1958); see also *Linkletter* v. *Walker*, 381 U. S. 618, 628, n. 13 and 639, n. 20 (1965); *Tehan* v. *Shott*, 382 U. S. 406, 416 (1966).

Respondent argues that the denial of the motion to proceed *in forma pauperis* by the Court of Appeals in this case and the dismissal of the appeal were permissible because the Court had before it the entire District Court record and because respondent's motion to dismiss and

petitioner's reply contained some argument on the merits. Nothing in the order entered by the Court of Appeals, however, indicates that the appeal was duly considered on its merits as *Nowakowski* requires in cases where a certificate of probable cause has been granted. Although *Nowakowski* does not necessarily require that the Court of Appeals give the parties full opportunity to submit briefs and argument in an appeal which, despite the issuance of the certificate of probable cause, is frivolous, enough must appear to demonstrate the basis for the court's summary action. Anything less than this, as we held in *Nowakowski,* would negate the office of the certificate of probable cause. Indeed, it appears that since *Nowakowski,* the Court of Appeals for the Second Circuit has accorded this effect to that ruling. The State informs us that "it appears to be the policy of the Court of Appeals for the Second Circuit that in cases where habeas corpus appeals have been dismissed, reargument will be granted and the appeal reinstated where the time to apply for certiorari had not expired prior to the decision in *Nowakowski.*" Brief for respondent 22–23.

Accordingly, the judgment below is vacated and the case is remanded to the United States Court of Appeals for the Second Circuit for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

MR. JUSTICE HARLAN and MR. JUSTICE STEWART, concurring.

Although we joined the *per curiam* decision in *Parker* v. *Ellis,* 362 U. S. 574, we are now persuaded that what the Court there decided was wrong insofar as it held that even though a man be in custody when he initiates

a habeas corpus proceeding, the statutory power of the federal courts to proceed to a final adjudication of his claims depends upon his remaining in custody. Consequently we concur in the opinion and judgment of the Court.

MR. JUSTICE HARLAN also notes that his views upon the issue discussed in his separate concurring opinion in *Parker, id.*, at 576, have not changed.

298-002 O - 69 - 19

UNITED STATES *v.* UNITED SHOE MACHINERY CORP.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

No. 597. Argued April 1, 1968.—Decided May 20, 1968.

In 1953 the District Court for the District of Massachusetts held that appellee had monopolized the manufacture of shoe machinery in violation of § 2 of the Sherman Act. The court refused the Government's request that appellee be divided into three separate companies and instead imposed certain restrictions and conditions designed "to recreate a competitive market." The District Court's decision was affirmed by this Court. The District Court's decree provided in paragraph 18 that: "On [January 1, 1965] both parties shall report to this court the effect of this decree, and may then petition for its modification, in view of its effect in establishing workable competition." Pursuant to this provision the Government reported on January 1, 1965, that appellee continued to dominate the market, that workable competition had not been established, and that further relief was needed. The Government asked that appellee be divided into two competing companies. The District Court held that *United States* v. *Swift & Co.*, 286 U. S. 106 (1932), limited its power to modify the decree to cases involving "(1) a clear showing of (2) grievous wrong (3) evoked by new and unforeseen circumstances," and since the object of the decree was "not to restore workable competition but to move toward establishing it" and the "decree has operated in the manner and with the effect intended," the Government's petition was denied. *Held:*

1. The District Court erred in denying the Government's petition on the authority of *United States* v. *Swift & Co., supra,* because there the defendants sought relief, not to achieve the purposes of the decree's provisions, but to escape their impact. The request was the obverse of the Government's allegation and request here. Pp. 248–249.

2. The District Court should determine whether the relief in this case has met the prescribed standards and, if not, should modify the decree so as to achieve the required result. Pp. 249–252.

(a) It is the trial court's duty to prescribe relief which will terminate the illegal monopoly in violation of § 2 of the Sherman Act and ensure that there remain no practices likely to result in monopolization in the future. Pp. 250–251.

(b) The specific provisions of the decree did not exhaust that court's power to afford relief which "should put an end to the combination . . . and break up or render impotent the monopoly power found to be in violation of the Act." *United States* v. *Grinnell Corp.*, 384 U. S. 563, 577 (1966). Pp. 251–252.

266 F. Supp. 328, reversed and remanded.

Assistant Attorney General Turner argued the cause for the United States. With him on the briefs were *Solicitor General Griswold, Francis X. Beytagh, Jr., Howard E. Shapiro, Thomas R. Asher,* and *Margaret H. Brass.*

Ralph M. Carson argued the cause for appellee. With him on the brief were *Conrad W. Oberdorfer, Robert D. Salinger, Lloyd N. Cutler, Taggart Whipple,* and *Louis L. Stanton, Jr.*

James F. Rill, John R. Hally, and *Thomas F. Shannon* filed a brief for the National Footwear Manufacturers Association, Inc., et al., as *amici curiae,* urging affirmance.

MR. JUSTICE FORTAS delivered the opinion of the Court.

In 1953, in a civil suit brought by the United States, the District Court for the District of Massachusetts held that appellee had violated § 2 of the Sherman Antitrust Act by monopolizing the manufacture of shoe machinery. The court found that "(1) defendant has, and exercises, such overwhelming strength in the shoe machinery market that it controls that market, (2) this strength excludes some potential, and limits some actual, competition, and (3) this strength is not attributable solely to defendant's ability, economies of scale, research, natural advantages, and adaptation to inevitable economic laws." *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295, 343 (1953). The court did

not order the relief requested by the Government—that appellee be dissolved into three separate shoe machinery manufacturing companies. Rather, the court imposed a variety of restrictions and conditions designed "to recreate a competitive market." [1] Appellee appealed to this Court, which affirmed the decision of the District Court. *United Shoe Machinery Corp.* v. *United States*, 347 U. S. 521 (1954).

The decree of the District Court, entered on February 18, 1953, and subsequently modified on July 12 and September 17, 1954, provided in paragraph 18 that:

> "On [January 1, 1965] both parties shall report to this Court the effect of this decree, and may then petition for its modification, in view of its effect in establishing workable competition. If either party takes advantage of this paragraph by filing a petition, each such petition shall be accompanied by affidavits setting forth the then structure of the shoe machinery market and defendant's power within that market." 110 F. Supp., at 354.

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[1] Some of the major provisions of the decree were as follows: United was enjoined from further monopolization; it was ordered to offer for sale all types of machines (previously only leased) at "such terms . . . as do not make it substantially more advantageous for a shoe factory to lease rather than to buy a machine"; if United continued leasing it was required to lease for no more than five-year terms under certain specified conditions; it was not to refuse a prospective customer's request to lease or buy a machine "except for good cause"; it was to submit a plan for disposing of certain sectors of its business; it was to grant to any applicant, except a deliberate infringer, a nonexclusive license under any or all patents held by it on reasonable nondiscriminatory royalty terms; it was not to acquire any patents or patent applications except those acquired by reason of bona fide employment of the inventor, nor was it to acquire patents or patent applications under exclusive license; it was not to acquire any second-hand shoe machinery or any shoe machinery manufacturer or a manufacturer or distributor of supplies for shoe factories.

Pursuant to this provision, the Government reported to the District Court on January 1, 1965, that appellee continued to dominate the shoe machinery market, that workable competition had not been established in that market, and that additional relief was accordingly necessary. The Government asked that appellee be required to submit to the Court a plan, pursuant to which United's business would be reconstituted so as to form two fully competing companies in the shoe machinery market. It also requested "such other and further relief as may be necessary to establish workable competition in the shoe machinery market."

The District Court, after a hearing, denied the Government's petition.[2] It held that under *United States* v. *Swift & Co.*, 286 U. S. 106 (1932), its power to modify the original decree was limited to cases involving "(1) a clear showing of (2) grievous wrong (3) evoked by new and unforeseen conditions." *United States* v. *United Shoe Machinery Corp.*, 266 F. Supp. 328, 330 (1967). Analyzing its 1953 decree, as amended, the court said that the object of the decree was "not to restore so-called workable competition but to move toward establishing it," and that "the 1953 decree has operated in the manner and with the effect intended. It has put in motion forces which, aided by new technology, have eroded United's power and already dissipated much of the effect of United's monopolization." 266 F. Supp., at 330, 334. Accordingly, in view of the stringent requirements of *Swift* as the court construed that decision, the District Court denied the Government's petition.

From this decision the Government appealed to this Court. We noted probable jurisdiction. 389 U. S. 967 (1967). We reverse.

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[2] A petition by appellee, seeking to be relieved of certain restrictions contained in the original decree, was similarly denied. The judgment in this regard is not before us, since appellee has not appealed to this Court.

I.

The District Court misconceived the thrust of this Court's decision in *Swift*. That case in no way restricts the District Court's power to grant the relief requested by the Government in the present case. In *Swift*, a consent decree had been entered in 1920 ordering a measure of divestiture by and imposing a variety of restraints upon the defendant meat packers. In 1930, after various unsuccessful attempts to secure modification or vacation of the decree, the packers filed a petition "to modify the consent decree and to adapt its restraints to the needs of a new day," as Justice Cardozo phrased it. 286 U. S., at 113. The lower court granted a measure of relief and the United States appealed. This Court reversed. It emphasized the power of a court of equity "to modify an injunction in adaptation to changed conditions though it was entered by consent." *Id.*, at 114. The question, it held, is "whether enough has been shown to justify its exercise." *Id.*, at 115. After reviewing the evidence, the Court concluded that the danger of monopoly and of the elimination of competition which led to the initial government complaint and the decree had not been removed and that, although in some respects the decree had been effectuated, there was still a danger of unlawful restraints of trade. The Court's language, quoted and relied on by the trial court here, to the effect that "nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change," *id.*, at 119, the decree, must, of course, be read in light of this context. *Swift* teaches that a decree may be changed upon an appropriate showing, and it holds that it may *not* be changed in the interests of the defendants if the purposes of the litigation as incorporated in the decree (the elimination of monopoly and restrictive practices) have not been fully achieved.

The present case is the obverse of the situation in *Swift* if the Government's allegations are proved. Here, the Government claims that the provisions of the decree were specifically designed to achieve the establishment of "workable competition" by various means and that the decree has failed to accomplish this result. Because time and experience have demonstrated this fact, according to the Government, it seeks modification of the decree. Nothing in *Swift* precludes this. In *Swift*, the defendants sought relief not to achieve the purposes of the provisions of the decree, but to escape their impact. Accordingly, we conclude that the District Court erred in denying the Government's petition "on the authority of United States v. Swift & Co., 286 U. S. 106, 119." 266 F. Supp., at 334.

II.

Decision as to the Government's petition to modify the decree in the present case must be based upon the specific facts and circumstances that are presented. In urging affirmance of the 1953 decision, the Government advised this Court that, in framing the decree, the District Court had "proceeded on the premise that relatively mild remedies should be tried as a first resort, and that the possibility of more drastic measures should be held in abeyance." Brief of the United States, No. 394, 1953 Term, 155. Paragraph 18 of the decree appeared to be in confirmation of this statement since it expressly required a report after 10 years of experience under the decree and contemplated that petitions for modification might be filed "in view of [the decree's] effect in establishing workable competition." Paragraph 18 then specifically provided that any such petition would have to be accompanied by "affidavits setting forth the then

structure of the shoe machinery market and defendant's power within that market." [3]

These specifications were peculiarly apt because this is a monopoly case under § 2 of the Sherman Act and because the decree was shaped in response to findings of monopolization of the shoe machinery market. That the purpose of the 1953 decree was to eliminate this unlawful market domination was made clear beyond question by the District Court's statement at the beginning of the section of its opinion dealing with relief. This read as follows:

> "Where a defendant has monopolized commerce in violation of § 2, the principal objects of the decrees are to extirpate practices that have caused or may hereafter cause monopolization, and to restore workable competition in the market." 110 F. Supp., at 346–347.

It is of course established that, in a § 2 case, upon appropriate findings of violation, it is the duty of the court to prescribe relief which will terminate the illegal monopoly, deny to the defendant the fruits of its statutory violation, and ensure that there remain no practices likely to result in monopolization in the future. See, *e. g., United States* v. *Grinnell Corp.*, 384 U. S. 563, 577 (1966); *Schine Theatres* v. *United States*, 334 U. S. 110, 128–129 (1948). The trial court is charged with inescapable responsibility to achieve this objective, although it may, if circumstances warrant, accept a formula for achieving the result by means less drastic than

[3] In paragraph 23 of the original decree jurisdiction was expressly retained "for the purpose of enabling either of the parties to apply to this Court at any time for such further orders and directions as may be appropriate for the correction, construction, or carrying out of this Decree, and to set aside the Decree and take further proceedings if future developments justify that course in the appropriate enforcement of the Anti-Trust Act." 110 F. Supp., at 354.

immediate dissolution or divestiture. The decree in the present case was carefully devised within the limits of this principle. Measures short of divestiture were prescribed with provisions for review and possible revision after 10 years.[4]

The District Court has now denied the Government's petition for modification of the decree on the ground that the decree is "still working at its long-range task of freeing the market from all consequences of United's monopolization and keeping the door wide open for the arrival of an adequately provided challenger." 266 F. Supp., at 334. According to the court, this was the intended effect of the decree.

If the decree had not contained paragraph 18—if it had been silent as to the time for submitting reports and, if necessary, petitions for modification—and if after 10 years it were shown that the decree had not achieved the adequate relief to which the Government is entitled in a § 2 case, it would have been the duty of the court to modify the decree so as to assure the complete extirpation of the illegal monopoly. The court's power to do this is clear. See, *e. g., United States* v. *Swift & Co.*, 286 U. S. 106 (1932); *Chrysler Corp.* v. *United States*, 316 U. S. 556 (1942). Its duty is implicit in the findings of violation of § 2 and in the decisions of this Court as to the type of remedy which must be prescribed.

We find nothing in the 1953 decree, as amended, or in the District Court's opinion relating thereto which presents an obstacle or embarrassment to the application of this principle in the present case. If the decree has not, after 10 years, achieved its "principal objects," namely, "to extirpate practices that have caused or may

[4] In rejecting the suggestion that United be forbidden to lease on any terms, the District Court stated specifically that it "agrees that it would be undesirable, at least until milder remedies have been tried, to direct United to abolish leasing forthwith." 110 F. Supp., at 349.

hereafter cause monopolization, and to restore workable competition in the market"—the time has come to prescribe other, and if necessary more definitive, means to achieve the result. A decade is enough.[5] Even if we should assume that paragraph 18, as the District Court now states, had only the limited purpose of calling for a 10-year report as to whether the decree was "gradually eroding United's 1953 power to monopolize the market," 266 F. Supp., at 330, its specific provisions did not exhaust the District Court's power. Relief in a Sherman Act case "should put an end to the combination and deprive the defendants of any of the benefits of the illegal conduct, and break up or render impotent the monopoly power found to be in violation of the Act." *United States* v. *Grinnell Corp.*, 384 U. S. 563, 577 (1966). See also *United States* v. *United States Gypsum Co.*, 340 U. S. 76, 88–90 (1950); *United States* v. *E. I. du Pont de Nemours & Co.*, 366 U. S. 316, 326 (1961). The District Court should proceed to determine whether the relief in this case has met the standards which this Court has prescribed. If it has not, the District Court should modify the decree so as to achieve the required result with all appropriate expedition.

It is so ordered.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

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[5] We emphasize that there is no issue here regarding the timing of the Government's petition for modification. No claim is made that the Government has petitioned for modification before the running of a reasonable period during which the effects of the original decree have become clear. Moreover, the Government may claim, persuasively, that paragraph 18 of the original decree specifically contemplated that the Government would petition when it did.

FIRST NATIONAL BANK OF ARIZONA *v.* CITIES SERVICE CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 23. Argued November 9, 1967.—Decided May 20, 1968.

One Waldron (hereafter petitioner), in 1956, filed an antitrust action seeking treble damages amounting to $109,000,000 against seven large oil companies, including respondent (Cities). In addition to charging a worldwide cartel maintained since 1928 by oil companies other than Cities, the complaint charged those companies with conspiring to boycott Iranian oil until Iran agreed to return Anglo-Iranian's properties which it had nationalized in 1951 alleging: that petitioner had a favorable contract to purchase Iranian oil over a five-year period; that negotiations had been conducted with Cities for its participation in the operation of the Iranian oil industry; that Cities joined the conspiracy, having been bribed in the latter part of 1952 by Gulf and Anglo-Iranian by an offer of Kuwait oil at prices lower than petitioner's offer; that in 1954 a Consortium Agreement was made whereby all the oil companies, including Cities, shared almost all the Iranian oil production; and that the boycott conspiracy frustrated petitioner's ability to sell oil under his contract. The trial judge granted defense motions to postpone answering the complaint pending the taking of petitioner's deposition, and meanwhile petitioner was stayed from any discovery of his own. The deposition of petitioner commenced in September 1956. From then till May 1962 he and his associates had their depositions taken (hereafter "were deposed") for 153 days in all, seven of which were attributable to Cities. Various stipulations which resulted in prolonging the deposition period were entered into at petitioner's request or with his agreement. During the course of his deposition petitioner stated that he had not initially attributed Cities' failure to buy Iranian oil from him to its participation in the boycott but that it was his discovery of Cities' purchase of Kuwait oil from Gulf plus its later participation in the Consortium that prompted him to join Cities as a conspirator. Accordingly, in 1960, Cities moved for summary judgment under Fed. Rule Civ. Proc. 56, on the ground that the affidavit of Hill, its officer in charge of Foreign Operations, and accompanying documents conclusively disproved petitioner's boy-

cott conspiracy theory by demonstrating that (1) Cities had negotiated to buy Kuwait oil from Gulf since 1948 and had substantially completed a final agreement before petitioner approached Cities and (2) Cities had only started negotiations to participate in the Consortium some two years after it was alleged to have joined the conspiracy and the eventual participation offered to Cities in the Consortium was so small that Cities, following its fruitless objections, transferred it to Richfield, in which Cities held a minority stock interest. The trial judge, following counterarguments by petitioner, though believing it "doubtful" that any issue of material fact existed and feeling that Cities had been joined on mere "suspicion," deferred ruling on Cities' summary judgment motion, but stated that petitioner's pretrial discovery would be "closely regulated." Thereafter he ordered that petitioner be allowed to depose Hill under Fed. Rule Civ. Proc. 56 (f), which provides for comparatively limited discovery for the purpose of showing facts sufficient to withstand a summary judgment motion. Petitioner's sole objection was that Cities' president, Jones, should be deposed rather than Hill. After depositions had been taken of petitioner's associates, petitioner deposed Hill for six days between September 10, 1962, and February 27, 1963, and later moved for additional discovery, whereupon Cities renewed its summary judgment motion. At oral argument on May 27, 1963, the trial judge reiterated his view that petitioner could point to no facts showing Cities' participation in the conspiracy and that Hill's deposition and other documentary evidence further disproved petitioner's theories. On June 28, 1963, petitioner filed an amended complaint eliminating most of the specific fact allegations and, in regard to Cities, omitting the specific allegations about Kuwait oil or membership in the Consortium and instead making the general allegation that Cities joined the conspiracy in a time and manner not known to petitioner and that the other oil companies and various co-conspirators "secretly threatened, induced and conspired with . . . Cities . . . to break off dealings with" petitioner. On June 23, 1964, the trial judge denied motions for summary judgment by other defendants, postponed final disposition of Cities' motion and gave petitioner opportunity under Rule 56 (f) to depose the three surviving members of Cities' executive staff who had participated in the alleged Iranian oil dealings and to have certain documents produced. The depositions were completed and the documents produced in July and August 1964. In September 1964 petitioner moved for the production of all documents in Cities' or the other defendants' possession relating to

Iranian oil between June 1952 and January 1955, and documents from and oral examination of Carter, a former Cities employee, who acted as an intermediary between Cities and petitioner. His counsel's supporting affidavit related facts designed to show that Cities' failure to follow through on its original interest in dealing with petitioner was substantial evidence of Cities' participation in the boycott allegedly organized by the other defendants. Cities again renewed its summary judgment motion and, following arguments on both motions, the trial judge granted summary judgment on September 8, 1965, holding that petitioner had failed to meet amended Rule 56 (e)'s requirement that a party opposing a properly supported summary judgment motion show by affidavit or otherwise "specific facts showing that there is a genuine issue for trial." The court ruled as to petitioner's cross-motion for additional discovery under Rule 56 (f) that his total failure to produce evidence tending to show Cities' part in a conspiracy demonstrated that additional discovery would be a fishing expedition and constitute harassment. The Court of Appeals affirmed. *Held:*

1. The trial judge's orders prior to the rendition of summary judgment were proper and did not place unfair limits on petitioner's access to relevant information. Pp. 270–274; 290–299.

(a) Petitioner himself from the beginning took the position that the two payoffs (the Kuwait contract and participation in the Consortium) were the only links between Cities and the conspiracy. By Hill's affidavit and supporting documents Cities apparently felt it could disprove these charges. Pp. 270–271.

(b) The trial judge did not abuse his discretion in ordering petitioner to limit initial discovery to Hill rather than Jones, Cities' president, with whom petitioner had primarily dealt; since Hill had been the ranking Cities official in charge of the Kuwait and Consortium transactions it is unrealistic to suggest that Jones could have involved Cities in such a large conspiracy without knowledge on the part of its other major executives; and in any case the issue became moot after Jones' death, which occurred before petitioner would have been able to depose him had the trial judge permitted him to do so. Pp. 272; 294–295.

(c) After Hill's deposition and the accompanying documents in its support petitioner no longer seriously contended that the evidence relating to Kuwait and Consortium was sufficient by itself to raise a genuine issue of material fact. P. 272.

(d) The order permitting petitioner to depose the surviving Cities officials with whom he had dealt was not unduly restrictive;

and petitioner was not prejudiced by not being allowed to depose other executives at the time he was allowed to depose Hill because it was not until he had deposed Hill that he began to suggest other possible motivations for Cities to conspire. Pp. 272–274.

(e) As petitioner himself acknowledges, Cities was in a totally different position from the other defendants. The discovery given the other defendants did not unduly favor Cities, whose own deposition testimony of petitioner totaled only 3½ days, since petitioner benefited as much *vis-à-vis* Cities from the depositions taken by the other defendants as Cities did. Though the case has been pending in the lower courts 11 years, during which time petitioner has not received a formal answer from any defendant nor been permitted general discovery, Cities has been the only party consistently desirous of expediting the proceedings and petitioner has always acquiesced in the delays. Pp. 290–292.

(f) Even assuming the disputed claim that petitioner was kept from obtaining general discovery of the other defendants during the period he sought to build a case against Cities, petitioner had discovery against the one party he is now opposing and that party was a "tangential defendant," whose link to the other defendants was shown to be factually incorrect. Under those circumstances it was petitioner's burden, which he did not meet, of showing a significant likelihood that discovery of the other defendants would be fruitful. Pp. 292–294.

(g) Petitioner has not shown any prejudice by not having been allowed to depose Carter, a former employee of Cities originally listed as one of petitioner's associates, concerning Jones' alleged interference with Carter's efforts as an intermediary between Cities and petitioner to sell the United States Government Iranian gasoline for military use; and even if Carter would not voluntarily have furnished petitioner information, petitioner has not explained why he did not try to secure Carter's testimony in 1961 (when the trial judge described petitioner's case as "extremely weak") or 1963 rather than waiting till 1964. Pp. 295–297.

(h) The time period to which petitioner's documentary requests pertain is one largely relating to activities outside the period covered by this phase of the lawsuit, and in view of petitioner's failure (despite substantial discovery) to obtain significant evidence of conspiracy for the period during which it was alleged to have directly injured him, the trial court was warranted in denying the additional documentary discovery petitioner requested. Pp. 297–298.

2. On the facts shown summary judgment was correctly awarded to respondent, since petitioner was unable to show sufficient material facts to raise genuine issues for trial of his case against Cities. Pp. 274–288.

(a) After Iran had nationalized Anglo-Iranian's properties, Anglo-Iranian, contending that the nationalization violated international law, announced that it would protect its rights in any country and would sue any purchaser of Iranian oil. Petitioner's evidence showed that the other defendants and other American oil companies, fearful that if Iranian nationalization of Anglo-Iranian's property succeeded, other countries would follow suit, refused to deal with any company handling Iranian oil. P. 278.

(b) When that compelling explanation for Cities' failure to purchase Iranian oil is coupled with Cities' showing that the Kuwait deal antedated nationalization, that Cities opposed the Consortium, and ultimately refused its minimal share therein, petitioner's suggestion that Cities was "bought off" becomes insupportable. Pp. 278–279.

(c) Petitioner's consistent argument that Cities' interests in this situation were opposed to those of the other defendants prompts him to insist that Cities' motive for conspiring is not controlling, but for petitioner to say that Cities' failure to deal with him showed Cities' participation in the conspiracy is to rely on motive. P. 279.

(d) A report prepared for transmission to Iranian premier Mossadegh in October 1952, after Jones returned from Iran and Watson, Cities' senior vice president, announced to petitioner that Cities was no longer interested in Iranian oil, is used by petitioner in two opposing ways and does not further petitioner's theory of conspiracy. Pp. 281–282.

(e) A letter sent by Jones to the incoming Secretary of State and Attorney General in January 1953 that the only solution was for Iran to reach an accommodation with the British, and a supporting legal memorandum that Iran under international law had the right to nationalize Anglo-Iranian's properties, likewise had no probative value for petitioner's case. Pp. 282–283.

(f) Petitioner's failure to sell oil to Richfield, of which Cities was a major though not a controlling stockholder, adds nothing to the case against Cities. Pp. 283–284.

(g) Jones' disassociating himself from Carter's efforts on petitioner's behalf to sell Iranian produced aviation gasoline to the

United States Air Force occurred at a time when petitioner conceded that Cities was not yet a member of the conspiracy and in any case seems to have constituted no more than a desire by Jones not to be used in someone else's financial dealings. P. 284.

(h) In view of the business relationship between petitioner, Cities, and the other defendants, it is much more plausible to believe that Cities' interests coincided, rather than conflicted, with those of petitioner. *Poller* v. *Columbia Broadcasting System*, 368 U. S. 464 (1962), distinguished. Pp. 284–286.

(i) Petitioner's position that Cities' failure to deal with him (the one fact that petitioner has produced) is sufficiently probative of conspiracy to withstand summary judgment cannot be supported where no interest of Cities was shown to parallel the interests of the other defendants. *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 208 (1939), and *Theatre Enterprises, Inc.* v. *Paramount Distributing Corp.*, 346 U. S. 537 (1954), distinguished. Pp. 286–288.

3. The lower courts correctly held that amended Fed. Rule Civ. Proc. 56 (e) placed upon petitioner the burden of producing evidence of conspiracy after Cities conclusively showed that the facts upon which petitioner relied to support his conspiracy allegation were not susceptible of the interpretation he sought to give them. Pp. 288–290.

361 F. 2d 671, affirmed.

William E. Kelly argued the cause for petitioner. With him on the briefs were *David Orlin, Preben Jensen,* and *Alan R. Wentzel.*

Simon H. Rifkind argued the cause for respondent. With him on the brief was *Edward N. Costikyan.*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

At issue in this case is the propriety of an award of summary judgment in favor of respondent Cities Service in a treble-damage antitrust action. The District Court held there was no genuine issue as to material facts between the parties and that respondent was entitled to

judgment as a matter of law. 38 F. R. D. 170 (D. C. S. D. N. Y. 1965). The Court of Appeals for the Second Circuit affirmed. 361 F. 2d 671 (1966). This Court granted certiorari, 385 U. S. 1024 (1967), to determine whether the decisions below were in conformity with *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U. S. 464 (1962). We conclude that *Poller* and other decisions of this Court were correctly applied and, accordingly, we affirm.

Because the question whether summary judgment is appropriate in any case is one to be decided upon the particular facts of that case, we shall set forth the background of this litigation in some detail (Part I) before turning to the specific issues petitioner raises (Parts II–V).

I.

On June 11, 1956, petitioner Waldron [1] filed a private antitrust complaint in the Southern District of New York against seven large oil companies: British Petroleum Co., Ltd. (formerly Anglo-Iranian Oil Co.), Gulf Oil Corp.,[2] Socony Mobil Oil Co., Standard Oil Co. of California, Standard Oil Co. of New Jersey, The Texas Co., and Cities Service Co. The complaint contained essentially two series of allegations. The first was copied from the complaint in a then-pending civil action by the United States against those defendants other than Cities Service, alleging the formation and maintenance by them of a worldwide oil cartel since 1928. The second series of allegations dealt specifically with a conspiracy claimed to have been entered into at the time

[1] Plaintiff, Gerald B. Waldron, died in November 1964. His executor has been substituted as the petitioner. We shall refer to both Waldron and the executor as "petitioner" or "Waldron" interchangeably.

[2] Gulf subsequently settled with petitioner and is no longer a party defendant, although it remains as an alleged co-conspirator.

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of the nationalization of the properties of the Anglo-Iranian Oil Co. by the Government of Iran in May 1951. The defendants other than Cities Service, it was asserted, agreed at that time to boycott Iranian oil in all world markets until Iran should agree to return Anglo-Iranian's property and concession rights. While the dispute between Anglo-Iranian and the Iranian Government under Premier Mossadegh was still continuing, Waldron and some of his associates allegedly succeeded in obtaining a contract to purchase 15,000,000 metric tons of crude oil or refined products from the National Iranian Oil Co. (NIOC), the company formed to take over Anglo-Iranian's nationalized properties, over a five-year period at a rate substantially less than the then current posted price for Persian Gulf oil. NIOC in return agreed not to deal with anybody other than Waldron in the United States market.

The complaint next stated that the defendants other than Cities Service conspired to prevent petitioner from selling any of the oil to which he was entitled under his contract with NIOC. It was further alleged that Cities Service, after first engaging in extensive negotiations with Waldron with an eye toward participating in the operation of the Iranian oil industry, broke off dealing and joined the conspiracy to boycott him as a result of having received what amounted to a bribe from Gulf and Anglo-Iranian, namely, a large supply of oil from Kuwait at a price even lower than that petitioner could offer Cities pursuant to his contract with NIOC. Finally, the defendants were alleged to have entered into a Consortium Agreement in 1954, pursuant to their attempt to monopolize Middle East oil production, which parceled out substantially all the Iranian oil production between them. Cities Service was claimed to have been permitted to purchase a share in the Consortium. Petitioner asserted that the boycott conspiracy

carried out by all the defendants completely frustrated his ability to sell oil under his contract and accordingly sought treble damages from them in the amount of $109,000,000.

Within the time set for the defendants to answer the complaint, various of them moved to take petitioner's deposition, and all of them moved to postpone the filing of their answers until the completion of that deposition. The motions were accompanied by affidavits of counsel that the legal questions presented by the complaint were extraordinarily complex and that they had insufficient information about petitioner's business dealings with the Iranian Government to permit them adequately to prepare their clients' answers within the 20-day time limit set by Rule 12 (a) of the Federal Rules of Civil Procedure. These motions were granted by Judge Weinfeld, who, in addition, stayed petitioner from any discovery of his own until completion of the defendants' discovery, apparently pursuant to then existing practice in the Southern District.[3]

The deposition of Waldron commenced on September 10, 1956, and continued until July 3, 1957, at which time petitioner's counsel announced his intention to limit further examination. Nothing further was done by any party until December 30, 1957, at which time a motion was made to terminate the taking of Waldron's deposition. By this time 62 days' testimony had been taken over a period of more than 15 months. All adjournments up to this point were either at Waldron's request or with his consent. Meanwhile, various of the defendants had noticed the depositions of petitioner's associates, Richard S. Nelson, James A. Bentley, James E. Zoes, Ray Carter, and Addison Brown, in October and November 1956. Pursuant to successive stipulations en-

[3] This practice has since been changed by rule. See 4 Moore, Federal Practice ¶ 26.13 [3], at 1154 (2d ed. 1967).

tered into between petitioner and the defendants, the taking of these depositions had been postponed up to the date of petitioner's motion to terminate the taking of his own deposition. In that motion petitioner also moved to vacate the notices to take depositions of his associates.

In response to petitioner's claims that the protracted examination of him by the defendants constituted harassment and an undue burden on him, the defendants pointed out that only one of their number had as yet examined Waldron and that the length of time over which the examination had proceeded had been with his complete acquiescence. As for petitioner's financial hardship contention, the defendants suggested that, in view of the damages sought by petitioner, it was not inappropriate that he be required to spend considerable time clarifying his claims before trial. Judge Herlands denied the motion on February 11, 1958, after argument; he ordered, however, that further examination of the petitioner by the seven defendants be limited to 52 working days, of which 10 were allotted to respondent Cities Service. In addition 174½ days were scheduled for the examination of Waldron's five associates, of which 31 went to Cities Service. The examinations were to be consecutive and were set to commence on March 10, 1958, unless the parties agreed otherwise. The defendants were authorized to postpone the filing of their answers until 30 days after the completion of the depositions, and petitioner was stayed from undertaking any discovery proceedings of his own during that period.

Pursuant to stipulation the continued examination of petitioner did not resume until September 15, 1958, and was not terminated until October 1959. Twenty-six days were spent deposing Waldron in the latter part of 1958 and only six days during all of 1959, of which 3½ were utilized by counsel for Cities Service. Petitioner's

associates were deposed between January 1960 and April 1962 for 58 working days, of which 3½ were used by counsel for Cities Service. Waldron was then examined for one additional day in 1962.

Thus, between September 1956 and May 1962, a period of over 5½ years, Waldron and his associates were deposed for a total of 153 days, of which only seven days were attributable to Cities Service. The various stipulations that resulted in prolonging the period required for the taking of these depositions were all entered into either at the request, or with the agreement, of petitioner.

During the course of his deposition by Cities Service, Waldron stated that he had at first not attributed Cities' failure to conclude some sort of a deal with him for Iranian oil to its participation in the boycott. He explained that it was his discovery of Cities' purchase of substantial amounts of Kuwait oil from Gulf, plus its subsequent participation in the 1954 Consortium, that prompted him to join it in his complaint as a member of the conspiracy. Accordingly, when Cities moved for summary judgment in its favor in 1960, it did so on the ground that the affidavit of Cities' Senior Vice President in Charge of Foreign Operations, George H. Hill, and the accompanying documents from Cities' files that were submitted in support of the motion conclusively disproved petitioner's theory that it had joined the alleged boycott conspiracy because it had been bought off by the other conspirators.

In brief, the documents demonstrated that Cities had been engaged in negotiations with Gulf [4] to purchase Kuwait crude oil since 1948, and that a substantially final agreement, although not the actual conclusion of a con-

[4] Anglo-Iranian was a co-owner of the Kuwait Oil Co., the actual holder of the entire Kuwait oil concession, but does not appear to have participated in the negotiations with Cities.

tract, had been reached on the proposed deal prior to the time petitioner first approached Cities.[5] As for the Consortium, the documents showed that Cities had only commenced negotiations with the defendants to obtain participation therein some two years after it was alleged to have joined the conspiracy and that the share it was eventually offered, over its strenuous objections, was so small that it transferred the share to the Richfield Oil Co., in which it held a minority stock interest.

In reply to Cities' motion, petitioner's counsel reiterated his contention that the course of dealings between Waldron and his associates, on the one hand, and various of Cities' executive personnel, especially its president, W. Alton Jones, on the other, raised an inference of conspiracy because the most probable conclusion to be drawn from Cities' decision to pass up the assertedly extremely beneficial deal proposed by petitioner, notwithstanding its need for additional supplies of imported oil, was that in some manner Cities either had been "reached" or had used its negotiations with Waldron as a means of forcing its way into the alleged Middle East oil cartel. Petitioner also suggested that Cities might well have made some sort of informal agreement with the other defendants concerning the Consortium that was not revealed by the documents and that Cities might have expected, at the time such an agreement was made, a more profitable share therein than it was eventually offered.

In response to these arguments, Judge Herlands, who had by this time been assigned to the case for all

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[5] Petitioner argues that a "most-favored-nations clause" was inserted at the last minute for the benefit of Cities. The record reveals that the so-called clause was simply a unilateral declaration from Gulf in the form of a letter from its chairman of the board that in the event of future price changes its policy would be to give Cities the benefit of the better price.

purposes, handed down a memorandum decision on March 30, 1961, postponing determination of Cities' motion for summary judgment. In his opinion Judge Herlands stated that it was "doubtful" whether any issue as to any material fact existed and that Cities had been named a defendant on mere "suspicion." Because he judged petitioner's claim against Cities "so insubstantial," he ruled that petitioner would not be given "carte blanche authority to conduct untrammeled pre-trial proceedings," but that such proceedings would be "closely regulated." Subsequently, Judge Herlands entered an order providing that petitioner was to be allowed to take the deposition of Hill, the Cities' executive who had been in charge of negotiating the Kuwait deal with Gulf and who had also carried out Cities' attempts to secure a participation in the Consortium.

At the hearing in 1961 on the proposed order to implement the court's decision, counsel for Waldron asked to depose Cities' president Jones first. Contrary to what appears to be the position taken now, petitioner acknowledged and accepted Judge Herlands' order that his discovery of Cities was to be carried out pursuant to Rule 56 (f), Fed. Rules Civ. Proc., which provides for comparatively limited discovery for the purpose of showing facts sufficient to withstand a summary judgment motion, rather than Rule 26, which provides for broad pretrial discovery. Petitioner's sole objection to the proposed order was that Jones should be deposed rather than Hill.

In response to Judge Herlands' observation that Hill was the man who was in the best position to provide information about the two alleged facts relied on in the complaint to link Cities to the conspiracy, petitioner's counsel for the first time argued that the Kuwait deal and the Consortium agreement were not crucial to the case. While maintaining the position that those two items were significant, counsel stated that Cities' motive

for entering the alleged conspiracy was basically irrelevant. He argued that the evidence showed that Cities had embarked on a course of dealing with Waldron and then inexplicably had broken it off, and that this sequence of events was in itself sufficient evidence of conspiracy to withstand summary judgment and to entitle petitioner to sufficient discovery to ascertain the reason for the breakoff.

This argument was rejected and the trial judge clearly stated that to withstand summary judgment petitioner would have to produce some factual evidence of conspiracy beyond Cities' mere failure to carry through on a deal for Iranian oil. The taking of Hill's deposition was scheduled, without objection by petitioner, to commence upon the completion of the depositions of petitioner's associates.

More than a year then elapsed, during which time, again pursuant to stipulations between all the parties, only 25 days were spent taking the depositions of petitioner's associates. Immediately after the completion of these depositions, in response to motions to strike portions of the complaint made by various defendants other than Cities, petitioner announced his intention to amend his complaint and entered into a stipulation with the other parties extending their time to move or answer until 30 days after service on them of the amended complaint. This stipulation was entered into on June 1, 1962, approximately 30 days prior to the time by which, under Judge Herlands' previous order, the defendants would have been required to answer the complaint or move for summary judgment. Some five weeks later, at the request of petitioner's counsel, a new stipulation was entered into postponing the taking of Hill's deposition until September 10, 1962, and staying petitioner's undertaking to file an amended complaint pending completion of the Hill deposition.

Between September 10, 1962, and February 27, 1963, pursuant to stipulations between the parties, petitioner deposed Mr. Hill for a total of six working days. Then, at the beginning of May, petitioner moved for additional discovery. In response to this motion respondent Cities Service renewed its summary judgment motion in addition to opposing further discovery by petitioner. At oral argument on May 27, 1963, Judge Herlands reiterated his opinion that thus far Waldron was still unable to point to any facts tending to show that Cities had participated in the alleged conspiracy. Indeed, the deposition testimony of Hill, plus various additional documentary evidence supplied in connection therewith, had further disproved the Kuwait and Consortium payoff theories. This evidence showed that Cities had actively resisted formation of the Consortium by the other defendants, even to the extent of making approaches to the United States Government in the hope of securing its intervention in the situation.

While the respective motions were pending before Judge Herlands, petitioner on June 28, 1963, filed an amended complaint. It differed from the original complaint in that most of the specific facts alleged in the original were replaced by more general allegations of conspiracy and boycott. In regard to Cities, the complaint was amended to omit all reference to any factual allegations involving either Kuwait oil or membership in the 1954 Consortium. In addition, those allegations of the original complaint which were directed at the other defendants and which had specifically excluded Cities were made more general, and the language excluding Cities was replaced by language referring simply to unspecified co-conspirators. In place of the previous specific allegations directed at Cities, the amended complaint substituted two new formulations: first, a general allegation that Cities joined the conspiracy at a

time and in a manner not known to the plaintiff; and, second, that the other defendants and various of their co-conspirators "secretly threatened, induced and conspired with defendant Cities Service to break off all dealings with plaintiff."

Judge Herlands held petitioner's and Cities' cross-motions under advisement for a little more than a year while he considered motions for summary judgment against petitioner made by the other defendants. Then, on June 23, 1964, in a long and comprehensive opinion dealing with both sets of motions, he denied the motions for summary judgment made by the other defendants, again postponed final disposition of Cities' motion and granted Waldron the opportunity to conduct further discovery of Cities under Rule 56 (f).[6] Presumably, decision on petitioner's motion was deferred so long because, had the motions of the defendants other than Cities for summary judgment been granted, petitioner's case against Cities would have also been terminated. In any event, the order implementing the decision permitted petitioner to depose all those members of Cities' executive staff then alive[7] who he alleged had participated at all in the dealings concerning Iranian oil, namely, Burl S. Watson, Cities' chairman of the board, Alfred P. Frame, Cities' first vice president, and J. Edgar Heston, Cities' manager of oil production. The order also directed Cities to produce all documents and memoranda relating to (a) the Kuwait and Consortium issues, (b) conversations and communications between it and any other defendant between June 11, 1952, and October 1, 1952, concerning petitioner, his asso-

[6] 231 F. Supp. 72.

[7] Cities' president, W. Alton Jones, died in an airplane crash on March 1, 1962. Three other Cities' executives who had participated in varying degrees in Cities' exploration of the possibility of purchasing Iranian oil had also died by this time.

ciates, and Cities' dealings in connection with Iranian oil, (c) conversations and communications between Cities and any other defendant between June 11, 1953, and September 30, 1953, pertaining to negotiations between Waldron and the Richfield Oil Corp. concerning the purchase by Richfield of Iranian oil, and (d) conversations and communications between any deponent for Cities and any other Cities' employee involving the subject matter described in the preceding categories. The depositions of the three Cities' executives were completed during the months of July and August 1964 and in connection therewith more than 140 documents were produced.

In September 1964 petitioner moved for the following additional discovery: first, the production of all documents in the possession of Cities dealing with Cities' activities in connection with Iranian oil between June 1952 and January 1955; second, the production of all documents relating to the same subject matter in the possession of the other defendants; and third, the production of all relevant documents from, and oral examination of, Ray Carter, a former Cities employee who had acted as an intermediary between Cities and petitioner in their dealings. Petitioner further indicated a desire to depose various unspecified officials of the other defendants after the completion of the discovery detailed in his motion. Immediately thereafter, in October 1964, Cities for the third time renewed its motion for summary judgment [8] and argument was had on both

[8] Although petitioner's discovery motion preceded respondent's renewal of its summary judgment motion, it is evident that petitioner's motion was made with full knowledge that a renewal of respondent's motion would soon be forthcoming. In a very real sense it was thus a response to the summary judgment motion and was intended to serve as a ground for arguing that the motion should not be granted.

motions in February 1965. Judge Herlands granted Cities' motion on September 8, 1965, holding that petitioner had failed to fulfill the requirement of amended Rule 56 (e) that a party opposing a properly supported summary judgment motion must produce by affidavit or otherwise "specific facts showing that there is a genuine issue for trial."[9] As to petitioner's cross-motion for additional discovery under Rule 56 (f), the court ruled that petitioner's total failure by that date to produce any evidence tending to show Cities' participation in a conspiracy to boycott him, despite considerable discovery, demonstrated that additional discovery would be merely a fishing expedition and would unduly harass respondent. The Court of Appeals for the Second Circuit affirmed the judgment of the District Court in all particulars.[10]

Petitioner states that three questions are presented by this case: first, whether he was improperly limited in the discovery permitted him prior to the rendering of summary judgment (Parts II, V, *infra*); second, whether sufficient material facts to raise genuine issues for trial were shown (Part III, *infra*); and third, whether the lower courts held, erroneously, that amended Rule 56 (e), Fed. Rules Civ. Proc., places the burden of showing that there is a genuine issue of material fact for trial on the party opposing a motion for summary judgment (Part IV, *infra*).

II.

We turn first to one aspect of petitioner's contention that his discovery was unduly restricted: whether certain orders of the trial judge imposed unfair limits on his access to relevant information. The second aspect of petitioner's discovery argument, addressed to what he viewed as the necessity for additional discovery to enable

[9] 38 F. R. D. 170.

[10] 361 F. 2d 671 (1966).

him adequately to oppose the summary judgment motion, we shall discuss in Part V of the opinion.

Petitioner's initial complaint, as set out more fully, *supra,* at 259–261, specifically alleged that Cities had adhered to the conspiracy by refusing to deal with petitioner after being bought off by the Kuwait contract and an opportunity to participate in the Consortium. Similarly, in his deposition, Waldron reiterated his belief that the only links between Cities and the conspiracy were those two payoffs. Thus, by petitioner's own doing, respondent Cities Service was from the beginning of the litigation placed in a vastly different position from the other alleged co-conspirators. Cities, realizing this, apparently felt that if it could show that it had in fact not received any payoff or bribe from the other defendants, petitioner would abandon his contention that it had joined the alleged conspiracy. Accordingly, immediately after it had taken Waldron's deposition, Cities made its motion for summary judgment accompanied by Hill's affidavit and the supporting documents described, *supra,* at 263–264. When Judge Herlands declined to grant Cities' motion at that time, he permitted petitioner to examine Cities about those specific facts that had theretofore been the only ones alleged as evidence of conspiracy on the part of Cities, other than its failure to make a deal with petitioner for Iranian oil. Petitioner appears to argue that it was erroneous for the trial court to limit his discovery initially to Hill rather than Jones, the person with whom he primarily dealt. However, since petitioner was the party who had injected Kuwait and Consortium into the case and since Hill had been the ranking Cities official in charge of both transactions, it is difficult to conclude that the trial judge abused his discretion in ordering petitioner to begin by examining Hill.

Even assuming *arguendo* that it was error for petitioner to have been required to begin his discovery with Hill rather than Jones, the issue is moot for purposes of appellate review because Jones' accidental death occurred prior to the time petitioner would have been able to commence deposing him had he been permitted by Judge Herlands to do so. There is no reason to believe that petitioner would have made any greater efforts to see that the examination of his associates, Bentley, Zoes, and Brown, was carried out in less than the 13 months that were actually taken had he been scheduled to depose Jones at the end of that time rather than Hill. Obviously it was Jones' death, rather than any action taken by Judge Herlands, that prevented his being deposed at some later date.

Although petitioner had begun to de-emphasize the significance of Kuwait and the Consortium to his claim of conspiracy by Cities at the first argument on Cities' motion for summary judgment, it was not until after the additional information described above was obtained through Hill's deposition, and the supporting documents accompanying it, that petitioner began to stress the contention that Cities had undergone a dramatic shift in its attitude towards him in September 1952, immediately after Jones had returned from a trip to Iran arranged for him by Waldron. While it is probably to overstate the case to say, as does respondent, that petitioner abandoned his Kuwait and Consortium claims at this time, it is fair to say that petitioner no longer seriously contended that the evidence relating to them was sufficient in itself to raise a genuine issue of material fact.

After again declining to grant Cities' motion for summary judgment, Judge Herlands entered an order permitting further discovery of Cities. It provided, as described in more detail, *supra,* at 268–269, for an examination of those Cities executives still alive who participated in

the negotiations between petitioner, Cities, and the Government of Iran. It also directed the production of all documents in Cities' possession relating to any contemplated dealings in Iranian oil during the period of Waldron's active contact with Cities, *i. e.,* between June 11, 1952, and October 1, 1952.[11]

This order had the effect of permitting Waldron to examine every surviving Cities official with whom he had dealt to any substantial degree in his attempts to arrange a sale of Iranian oil. He was permitted to examine them, and have production of all documents in connection therewith, concerning all the events that he had specified in his original complaint or in the two previous oral arguments on Cities' motion for summary judgment as being evidence of Cities' participation in the alleged conspiracy. Certainly the scope of this order, viewed as of the time it was made, does not seem open to any serious challenge as unduly restrictive, and petitioner did not make any such argument at the time the order was proposed. It was only when petitioner moved for additional discovery in the fall of 1964 that he began seriously to complain about the allegedly limited scope of the prior discovery order. Accordingly, we shall postpone more detailed discussion of this point to Part V, *infra.*

Petitioner did argue then, and still contends now, that he was prejudiced by the failure of Judge Herlands to let him examine various other Cities executives, in addition to Jones, at the time he was permitted to depose Hill. He bases this contention on the ground that many of these executives were men of advanced years at that time and that the deaths that in fact ensued[12] could

[11] Documents covering internal Cities' discussion of these matters were also ordered to be produced for the period from October 1, 1952, to November 1, 1952.

[12] See n. 7, *supra.*

thus have been reasonably foreseen. The fallacy in this argument is that it was only after Hill testified that petitioner changed the focus of his argument before the trial judge to minimize the significance of Kuwait and Consortium and to suggest other possible motivations for Cities to conspire. Certainly Judge Herlands was not required to anticipate that petitioner would change the entire factual emphasis of his case so that individuals who did not at the time appear to be particularly vital to the litigation would subsequently become so. Moreover, petitioner did not even ask to depose any Cities official who subsequently died, other than Jones, at the time he was permitted to examine Hill. Therefore, petitioner's claim of prejudicial error here must fail also.

III.

In his affidavit in support of Waldron's motion for additional discovery, petitioner's attorney detailed the facts produced to date that assertedly showed Cities' participation in the conspiracy, in order both to support his contention that additional discovery was needed and to demonstrate that summary judgment in favor of Cities should not be granted. We shall first discuss the propriety of Judge Herlands' award of summary judgment before dealing further (in Part V) with petitioner's contentions relating to additional discovery.

A.

When petitioner moved for additional discovery in 1964, in opposition to Cities' still pending motion for summary judgment, his counsel's affidavit pointed to the following evidence as tending to show a participation by Cities in the alleged conspiracy [13] to boycott his

[13] For the purpose of evaluating Waldron's case against Cities, his allegations about a conspiracy to boycott him carried out by the other defendants herein must be taken both as true and as

attempts to resell the Iranian oil to which he allegedly had access under his contract. Cities had a need to import substantial amounts of crude oil for its domestic operations in the United States, this need amounting to some 100,000 barrels per day. Cities had theretofore been unable to obtain an independent oil supply in the Middle East despite its long-existing desire to do so. Through petitioner, Cities had two assertedly attractive possibilities of fulfilling its crude oil needs. The first consisted of short-term purchases of Iranian oil at prices substantially below the going rates for Mideast oil via petitioner's contract with NIOC. The second, in which Cities was apparently more interested and on which tentative agreement with petitioner was allegedly reached, was for Cities to enter into a long-term arrangement to take over the operation of the entire Iranian oil industry (or a substantial portion thereof) in place of Anglo-Iranian, and to compensate Waldron for what would amount to a transfer of his contract rights.

The evidence further showed that Cities went to substantial lengths to explore the possibilities presented by petitioner. Waldron, at Jones' request, secured an invitation for Jones, together with other Cities executives, from Premier Mossadegh to go to Iran to look over the production facilities that NIOC had appropriated from Anglo-Iranian. Upon examination of the facilities, the Cities executives concluded that, notwithstanding the departure of the British personnel who had previously been in charge of operations, the Iranians had managed to keep them in relatively good operating condition. This conclusion was orally presented to Mossadegh by Jones and a comprehensive written report on specific details was promised to be transmitted later. During

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legally sufficient. We, of course, intimate no opinion on the merits of petitioner's claims against the other defendants that are still pending below.

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his stay in Iran, Jones also made a side trip to Kuwait to visit the Kuwait Oil Company, owned jointly by Anglo-Iranian and Gulf. On the return of the Cities party to the United States, Watson [14] informed petitioner in October 1952 that Cities did not propose to take any steps relative to obtaining Iranian oil, although another Cities executive subsequently indicated to him that Cities had not entirely abandoned its interest in his proposals. However, Cities had no further significant dealings with Waldron thereafter. Meanwhile on September 21, 1952, Carter, acting on petitioner's behalf, had sent a telegram to Secretary of the Interior Chapman offering to sell a cargo of Iranian-produced aviation gasoline to the United States Air Force. Carter stated that Jones had said that he would use his good offices to get the United States to purchase the gasoline. Instead, Jones cabled Watson instructions to tell Chapman that he was disassociating himself from Carter's efforts and that he questioned the wisdom of Carter's proposal. This Watson did.

Subsequently, in January 1953, Jones wrote to the incoming Secretary of State and Attorney General informing them of his belief that the only solution to the Iranian oil problem would be some sort of agreement between Iran and Anglo-Iranian. He accompanied this missive with a legal memorandum which stated that under international law Iran appeared to have the right to nationalize the Anglo-Iranian oil properties, but he asserted that the memorandum had not been prepared as a step toward Cities' involving itself in the Iranian situation. Three weeks later the final contract with Gulf for a 15-year supply of 21,000 barrels per day of Kuwait oil, plus an option for an additional 30,000 barrels per day, was signed by Cities and Gulf.

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[14] At this date Watson was Cities' senior vice president. He subsequently became chairman of the board.

Meanwhile Waldron continued his unsuccessful efforts to sell Iranian oil to various American companies. In particular, in June 1953, he entered into extensive negotiations with the Richfield Oil Company, in which Cities had about a one-third interest. Although great interest was shown initially by Richfield, petitioner was told in September that it had decided not to purchase Iranian oil after all. Then, in 1954 the Consortium was set up to take back Anglo-Iranian's properties and concession from NIOC, and Richfield obtained a share of about 1½% therein.[15]

Petitioner argues that the inference that Cities was a participant in the alleged conspiracy to boycott him follows from the foregoing facts. Even viewed without reference to other facts of record, it is apparent that petitioner's main argument is that Cities' failure to follow through on its original substantial interest in dealing with him is substantial evidence of participation in the boycott allegedly organized by the other defendants. And undoubtedly, given no contrary evidence, a jury question might well be presented as to Cities' motives in not dealing with Waldron, cf. *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U. S. 464 (1962), notwithstanding that such a failure to deal conceivably might also have resulted from a whole variety of non-conspiratorial motives involving the exercise of business judgment as to the attractiveness of the opportunity offered by petitioner. However, as we next show, the record in this case contains an overwhelming amount of such contrary evidence of Cities' motives, much of it supplied by petitioner himself.

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[15] This percentage was made up of the three equal shares initially awarded to Richfield, Cities, and the Sinclair Oil Corp. (Sinclair also held about a one-third stock interest in Richfield.) Cities and Sinclair both transferred their shares to Richfield, apparently for no consideration.

B.

Immediately after the nationalization, Anglo-Iranian publicly announced both in the news media and throughout the oil industry its view that the nationalization of its properties and the abrogation of its concession rights amounted to an illegal act under international law and stated its intention to "take all such action as may be necessary to protect its rights in any country," including the bringing of lawsuits against any purchaser of Iranian oil. In addition, the evidence introduced by petitioner tended to show that the other major oil company defendants in this suit, as a result of their fear that countries in which they held concessions would follow the Iranian lead should the nationalization of Anglo-Iranian's property be successful, also communicated to Cities and other domestic oil companies their intention to support Anglo-Iranian by refusing to deal with any company that handled Iranian oil. That such threats were both substantial and effective is demonstrated by the testimony of petitioner that numerous American oil companies, not made parties defendant in this action, refused to deal with him for precisely the reason that they were afraid of retaliation. In addition, petitioner testified that the other defendants had threatened to boycott any companies that leased tankers for use in transporting Iranian oil.

It is thus clear that the evidence furnished by petitioner himself provides a much more compelling explanation for Cities' failure to purchase Iranian oil than does his argument that such failure is evidence of conspiratorial behavior by Cities. When this explanation is placed in juxtaposition with the evidence introduced by Cities showing that the Kuwait deal was arranged long before the nationalization, that Cities objected continually to the formation of the Consortium, and that Cities refused the minimal share offered it as a prospective par-

ticipant therein after the failure of its efforts to block the formation of the Consortium, the suggestion that Cities was in some manner bought off becomes insupportable. Petitioner attempts to escape the force of this showing by arguing that he is obligated not to demonstrate why Cities conspired but only to show that Cities in fact conspired. However, this contention, though undoubtedly true in the abstract, has little relevance to Waldron's theory of how he has introduced evidence that Cities in fact conspired.

Petitioner himself consistently argues that Cities' interests in this entire situation were directly opposed to those of the other defendants. The others had large supplies of foreign oil; Cities did not. The others allegedly were members of an international cartel to control foreign oil; Cities was not. The others were interested in re-establishing the status quo prior to nationalization; Cities was not. It is doubtless due to the difficulty of suggesting a motive for Cities to conspire against him, coupled with Cities' demonstrated interest in his proposals for several months (to the extent that Cities even paid Waldron several thousand dollars to reimburse him for his time and expenses incurred in arranging Jones' trip to Iran), that prompts petitioner, understandably enough, to insist that motive is not controlling in his case. However, to suggest, as petitioner does, that Cities' participation in the conspiracy is shown by its failure to deal with him is itself to rely on motive.

Obviously it would not have been evidence of conspiracy if Cities refused to deal with Waldron because the price at which he proposed to sell oil was in excess of that at which oil could be obtained from others. Therefore, it is only the attractiveness of petitioner's offer that makes failure to take it up suggestive of improper motives. However, it has been demonstrated

above that for Cities to enter into any deal with Waldron for Iranian oil would have involved it in a variety of unpleasant consequences sufficient to deter it from making any such deal.[16] Therefore, not only is the inference that Cities' failure to deal was the product of factors other than conspiracy at least equal to the inference that it was due to conspiracy, thus negating the probative force of the evidence showing such a failure, but the former inference is more probable.

Petitioner does attempt to point to other evidence besides the simple failure to deal as showing conspiracy.[17]

[16] In his brief in this Court petitioner drastically changes his theory of conspiracy. He now argues that Cities' participation in the conspiracy was obtained by threats of retaliation from the other defendants. While conceivably petitioner could have argued at the trial level that under such cases as *Klors, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U. S. 207 (1959), and *United States* v. *Parke, Davis & Co.*, 362 U. S. 29 (1960), acquiescence because of threats in an illegal scheme conceived and carried out by others for their own benefit makes the acquiescing party a member of an illegal combination, we decline to pass upon such a contention when it is presented for the first time in this Court. Although at one point in this complex and protracted case, which has thus far produced over 12,000 pages of record, the petitioner alleged that the other defendants have "secretly threatened, induced and conspired with defendant Cities Service to break off all dealings with plaintiff," this intimation of a coerced acquiescence theory was never properly pursued. *Klors* and *Parke, Davis* have not been cited or discussed by petitioner once in the entire course of these proceedings. One searches in vain among petitioner's papers prior to argument in this Court for a single intelligible statement of this theory. In these circumstances we cannot attribute error to the courts below for their failure to discern such a theory, nor would it be appropriate at this stage in the case for us to pass upon petitioner's theory of combination through coerced acquiescence and the accompanying difficult questions it would raise concerning Cities' liability to petitioner or possible rights over against the other defendants.

[17] Petitioner argues that Cities has thus far failed specifically to deny the allegations in his complaint charging it with conspiracy. In his original complaint petitioner charged that Cities "[a]t this

He places considerable reliance on the report prepared for transmission to Mossadegh in October 1952, immediately after Jones' return from Iran and Watson's announcement to Waldron that Cities was no longer interested in Iranian oil. He stresses two aspects of the report as evidencing Cities' participation in the boycott: first, the statement that it was necessary for Iran to come to some sort of agreement with the British (Anglo-Iranian was owned 51% by the British Government) about compensation for the concession rights and expropriated property, and, second, the suggestion that there existed the possibility that an American company (presumably Cities) would import some Iranian oil purchased

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time and by these acts [referring to the Kuwait deal and the Consortium Agreement] . . . entered into combination and conspiracy with the other defendants." Cities submitted an affidavit denying that Kuwait oil and a share in the Consortium had been given it as part of a conspiracy. In other words, Cities denied the factual allegations of petitioner but not the ultimate legal conclusion based thereon, namely conspiracy. A fair reading of that document requires that it be given its intended effect as a denial of petitioner's claim against Cities. Moreover, petitioner never made this argument in either of the lower courts (especially not in the District Court where Cities could have remedied any defects in the papers supporting its motion had they been pointed out in time) and we are not disposed to consider it now, particularly in light of its extreme technicality as applied to the facts of this case.

Petitioner also objects that only W. Alton Jones could have adequately denied the allegations of conspiracy and urges, therefore, that Cities' submission of such an affidavit from Hill rather than from Jones should be held against Cities as evidence of conspiracy. However, as previously pointed out, Hill was the natural person to respond to petitioner's factual allegations about Kuwait and the Consortium. See *supra*, at 271. Contrary to petitioner's characterization of Hill as an attorney and an underling, Hill was an executive vice president of Cities, who had gone to law school many years before but who had not practiced law in a long time. As for petitioner's failure to examine Jones, that has been shown above to be due basically to his own lack of diligence. See also n. 20, *infra*.

directly from NIOC. It is interesting to note that petitioner attempts to use this memorandum in two opposing ways. He suggests, on the one hand, that the reference to the necessity for British cooperation if the Iranian oil industry were to be reactivated is evidence of Cities' adherence to the scheme initiated by Anglo-Iranian to force Iran to return the properties, and, on the other, that the statement that it would be possible for Iran to sell substantial amounts of oil without such an agreement is evidence of Cities' continued interest in Iranian oil. It is difficult to see how the latter contention supports an inference of conspiracy. Petitioner also ignores the fact that the latter alternative was characterized by Jones in the report as less desirable insofar as Iran's long-term interests were concerned, and that, with regard to Cities' participation in such an arrangement, Jones also stated that "[d]evelopment of some method, possibly through agreement between United States and British Governments, [would have to be made] that would allow Iranian crude to move to U. S. markets without tie-ups, law suits and other similar harassments to the purchasers of the crude."

Petitioner also emphasizes the statement sent by Jones to the incoming Secretary of State and Attorney General that the only solution for Iran lay in some sort of accommodation with the British. Since this was also the position taken, in effect, by the other alleged conspirators, petitioner suggests that it too shows common purpose. However, once Jones had decided that Cities could not risk trying to break the boycott itself, it was merely a factual observation to state that Iran would not be able to restore the operation of its oil industry without some kind of agreement being made with the boycotters. The use of the phraseology that this was the only "honorable course" hardly changes the factual background of the letter.

In addition, the statement is substantially similar to that made in the report intended to be sent to Premier Mossadegh on which petitioner relies to show Cities' continued interest in Iranian oil. Petitioner himself notes that the agreement contemplated in the report between Iran and Anglo-Iranian would involve an American company (hopefully Cities) taking over the operation of the oil industry, while Anglo-Iranian would be compensated for its property. Since Anglo-Iranian was insisting that its property and concession rights be returned to it outright, and was rejecting proposals to substitute the payment of compensation therefor, this proposal by Jones is not reasonably susceptible of the interpretation sought to be placed on it by petitioner.

Moreover, the letter was accompanied by a legal memorandum, stating that Iran had a right under international law to nationalize its oil industry, that ran directly counter to the consistent position taken by the other defendants in this case. Indeed, it went to the heart of their defense, since one of the arguments being made below is that the other defendants were merely acting to protect their property rights. See 231 F. Supp., at 87.

Petitioner argues that the failure of the Richfield Oil Co. to deal with him is evidence of conspiracy by Cities because Cities was a major, although not a controlling, stockholder in Richfield. However, aside from Cities' stock interest in Richfield, petitioner has produced no evidence other than speculation to connect this failure with any action by Cities. As for the probative value of the failure to deal with Waldron, the same objection is applicable to the proposed transaction with Richfield that has been discussed in connection with the proposed deal with Cities, namely, the probability that it was due to a desire to avoid difficulties that would be presented by Anglo-Iranian and the other defendants. Moreover, since petitioner's contract had expired by the

time the deal fell through, it is also possible that no agreement was reached because Waldron no longer had anything to offer. Therefore, the failure of petitioner to sell oil to Richfield adds nothing to his case against Cities.

Finally, petitioner places great reliance on Jones' alleged interference in his efforts to sell the United States Government a cargo of gasoline for military use. One difficulty with this contention is that the incident occurred at a time when, petitioner conceded in the trial court, Cities was not yet a member of the conspiracy. A more basic objection to it, however, is that it is apparent that Jones, in his cable to the Secretary of the Interior, was primarily concerned with disassociating himself from Carter's efforts to promote the sale, efforts which Carter intended to tell the Secretary were supported by Jones. Under those circumstances, what petitioner characterizes as vindictive interference by Jones appears far more likely to have been a desire not to be used in someone else's financial dealings. In any event, it is insufficient support, in light of all the other evidence, on which to base a case for participation by Cities in the conspiracy.

C.

In support of his contention that summary judgment against him was improper, petitioner relies heavily upon *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U. S. 464 (1962). In *Poller* the plaintiff claimed that CBS canceled its affiliation agreement with his UHF station pursuant to a conspiracy between CBS and some third parties to drive him out of business in order to give CBS a short-term monopoly of the UHF market in the Milwaukee area, and ultimately to eliminate UHF competition there entirely. The plaintiff introduced evidence showing that CBS had canceled his affiliation, that it purchased and affiliated with another UHF station in

competition with him, that he was driven out of business as a result of the competition with the other station, and that subsequently CBS terminated the operation of its station, thereby leaving the Milwaukee market without any UHF service at all. CBS in turn relied on evidence consisting largely of affidavits from, and depositions of, various of its executives asserting that the actions taken by it were the result not of conspiracy but of its legitimate business decision to enter into competition in the UHF market in the Milwaukee area. The basic issue between the parties, therefore, concerned the motives of CBS in canceling its affiliation with the plaintiff Poller. This Court held that where there was substantial factual evidence tending to show the existence of a conspiracy to eliminate a competitor and where the crucial question was motive, summary judgment was prematurely granted against the plaintiff, notwithstanding the fact that there was also substantial evidence tending to show the nonexistence of conspiratorial behavior.

At first glance the present case seems to present substantial similarities to the situation in *Poller* in that the issue as to Cities' motive in failing to conclude a deal with petitioner is likewise basic to the litigation here. However, there are crucial differences between the two cases. In *Poller* the competitive relationship between CBS and the plaintiff was such that it was plausible for the plaintiff to argue that CBS had embarked on a plan to drive him out of business. In this case, as Waldron has admitted right along, the business relationship between him, Cities, and the other defendants was such that it is much more plausible to believe that Cities' interests coincided, rather than conflicted, with those of petitioner. And, in fact, the course of dealings between petitioner and Cities over the strenuous objection of the other defendants gives ample evidence of

precisely this similarity of interest. As Waldron himself candidly stated in the course of his deposition, he would not have originally included Cities as a co-conspirator had he not conceived the idea that the ultimate failure of Cities to deal with him was the result of some sort of payoff. Yet as described, *supra*, at 263–264, 267, Cities has introduced overwhelming evidence that no such payoff was ever made or promised to it in return for an agreement not to deal with Waldron, a showing which petitioner has in no way rebutted. Petitioner is thus forced to take the position that the one fact that he has produced, Cities' failure to make a deal with him for Iranian oil, is sufficiently probative of conspiracy to entitle him to resist summary judgment.

In support of this position, petitioner relies heavily on *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 208 (1939), and *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U. S. 537 (1954). In *Interstate Circuit* a group of motion picture distributors, at the request of two large first-run exhibitors, simultaneously imposed identical restrictions on subsequent showings of the films they distributed. These restrictions had the effect of forcing subsequent-run exhibitors to raise their admission prices substantially in the direction of the prices then charged by the competing first-run exhibitors at whose behest the restrictions were imposed. This in turn tended to restrain competition among the exhibitors by depriving the subsequent-run exhibitors of much of their ability to compensate for their competitive disadvantages by selling tickets at a considerably lower price than that charged by the first-run exhibitors. Other restrictions prohibiting the showing of double-features in subsequent-run theatres were imposed with similar anticompetitive effects. There was no direct evidence showing that the distributors agreed with one another to impose the identical restrictions, but it was

shown that each distributor knew that all the other distributors had been approached with the same proposal and that the imposition of the restrictions would be feasible only if adhered to by all distributors. Finally, it was shown that the identical action taken had the effect of creating a likelihood of increased profits for each distributor. This Court held that on the foregoing facts a tacit agreement to restrain competition between the distributors could properly be inferred.

Interstate Circuit differs from the case at hand in precisely the same way that *Poller* does, namely, in the inferences of motive that can reasonably be drawn from the facts. The reason that the absence of direct evidence of agreement in *Interstate Circuit* was not fatal is that the distributors all had the same motive to enter into a tacit agreement. Adherence to such an agreement would enable them to increase their royalties by forcing a rise in admission prices without the danger of competitors enlarging their share of the subsequent-run market by refusing to impose similar restrictions. That such a step would also aid the first-run exhibitors proposing it to restrain competition between themselves and subsequent-run exhibitors would not significantly diminish the anti-competitive benefits to be obtained by the distributors. Here Waldron is unable to point to any benefits to be obtained by Cities from refusing to deal with him and, therefore, the inference of conspiracy sought to be drawn from Cities' "parallel refusal to deal" [18] does not logically follow.

Theatre Enterprises, also relied on by petitioner, merely reiterated the holding of *Interstate Circuit* that "business behavior is admissible circumstantial evidence from which the fact finder may infer agreement," 346

[18] See generally Turner, The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals To Deal, 75 Harv. L. Rev. 655 (1962).

U. S., at 540, in the course of ruling that the parallel behavior there shown did raise a conspiracy issue for the jury, which permissibly resolved it in the defendants' favor on the basis of the other contrary evidence in the case. It did not purport to deal with a situation where the interests of the parties whose behavior was "consciously parallel" were substantially divergent and thus is inapplicable here. Thus neither precedent nor logic supports petitioner's contention that the evidence to which he points is significantly probative of conspiracy and, therefore, we hold that on the facts as shown summary judgment was correctly awarded to respondent.

IV.

Rule 56 (e) of the Federal Rules of Civil Procedure states that "[w]hen a motion for summary judgment is made and supported . . . an adverse party may not rest upon the mere allegations or denials of his pleading, but his response . . . must set forth specific facts showing that there is a genuine issue for trial." Petitioner contends that the lower courts misapplied Rule 56 (e) in this case and erroneously placed the burden on him to show that there was a material issue of fact for trial, rather than first requiring respondent Cities Service, the movant, to demonstrate the absence of a "genuine issue as to any material fact" under Rule 56 (c). However, it should be noted that the decisions below did not purport to discuss burden of proof at all. Therefore petitioner must demonstrate that, regardless of what was specifically held, the effect of the decisions below was to so shift the burden of proof.

It is true that the issue of material fact required by Rule 56 (c) to be present to entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that

is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial. The case at hand presents peculiar difficulties because the issue of fact crucial to petitioner's case is also an issue of law, namely the existence of a conspiracy. What Rule 56 (e) does make clear is that a party cannot rest on the allegations contained in his complaint in opposition to a properly supported summary judgment motion made against him.[19] Yet the analysis of the facts undertaken above demonstrates that, due to the absence of probative force of Cities' failure to deal with Waldron as being in itself evidence of conspiracy, petitioner's position is, in effect, that he is entitled to rest on the allegations of conspiracy contained in his pleadings. Thus petitioner repeatedly states that Cities has never disproved its participation in the alleged conspiracy, despite the fact that the only evidence of such participation is his allegation that the failure to deal resulted from conspiracy.

Essentially all that the lower courts held in this case was that Rule 56 (e) placed upon Waldron the burden of producing evidence of the conspiracy he alleged only after respondent Cities Service conclusively showed that the facts upon which he relied to support his allegation were not susceptible of the interpretation which he sought to give them. That holding was correct. To the extent that petitioner's burden-of-proof argument can be interpreted to suggest that Rule 56 (e) should, in effect, be read out of antitrust cases and permit plaintiffs to get to

[19] Indeed it was for the precise purpose of overturning a line of cases in the Third Circuit holding that a party could successfully oppose summary judgment by relying on his well-pleaded allegations that Rule 56 (e) was amended in 1963. See 6 Moore, Federal Practice ¶ 56.22[2], at 2821 (2d ed. 1966).

a jury on the basis of the allegations in their complaints, coupled with the hope that something can be developed at trial in the way of evidence to support those allegations, we decline to accept it. While we recognize the importance of preserving litigants' rights to a trial on their claims, we are not prepared to extend those rights to the point of requiring that anyone who files an antitrust complaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint.

V.

We have postponed our discussion of petitioner's contention that he should have been permitted additional discovery prior to the grant of summary judgment to this point in order that it may be evaluated in the light of what he had succeeded in accomplishing as of the date he made the motion.

A.

Petitioner makes much of the fact that the present action has been pending in the lower courts for 11 years and that he has not yet received a formal answer to his complaint from any defendant nor been permitted any general discovery. Petitioner also complains of the inequity of his being faced with a motion for summary judgment after having been deposed for thousands of pages by the defendants, but before he has had an opportunity to obtain discovery from them. In particular, he emphasizes that in an antitrust conspiracy case discovery is vital because most of the evidence of conspiracy will naturally be in the hands of the defendants. However, petitioner fails to come to grips with the problems presented in this extremely complicated suit by the fact that one of the defendants, Cities Service, has from the beginning of the litigation attempted to disassociate itself

from the others on the ground that, as petitioner himself acknowledged and initially alleged, it was in a totally different position from the other defendants.

Thus when petitioner emphasizes the considerable discovery had of him by the defendants as a group, he implies that Cities has been unfairly permitted more discovery of him than he has of it. He attempts to minimize the significance of the fact that Cities' participation in his examination amounted to a total of 3½ days of deposition testimony by arguing that Cities benefited from the extensive examination conducted by the other defendants. The record reveals, however, that much of the evidence obtained by the other defendants in deposing petitioner and his associates is relied on heavily by petitioner himself to bolster his case against Cities. Had the record in this case consisted only of the evidence obtained by petitioner from Cities together with the testimony taken by Cities from Waldron, petitioner's case against Cities would be even weaker than it is. In fact, petitioner would undoubtedly have chosen to submit affidavits in opposition to Cities' motion for summary judgment containing much of the same material incorporated in his and his associates' depositions. Hence petitioner benefited as much *vis-à-vis* Cities from the depositions taken by the other defendants as Cities did. Under such circumstances petitioner cannot justifiably claim that Cities has been given an unfair advantage by the extent of his examination by the other defendants.

As for petitioner's general objections to the length of time that his case has been pending, it is clear that Cities Service has been the only party to the litigation that has exhibited any consistent desire to expedite the proceedings, and that, even where postponements and adjournments have been sought by either Cities or the other

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defendants, petitioner has always been willing to acquiesce in delay.[20] Certainly petitioner cannot claim that it was the responsibility of the trial judge to hurry matters along by rejecting stipulations entered into by all the parties to the case.

Petitioner's more vehement objections have to do with his claim that he has been stayed from obtaining general discovery of the other defendants in the case throughout the period during which he has sought to build a case against Cities. Since there is no indication that petitioner will be unable to obtain general discovery at some future date of the other defendants for use against them in the case still pending below, the issue here is whether he can compel Cities to remain a party to the litigation pending such general discovery. Assuming the correctness of petitioner's claim that he has been stayed from conducting such discovery (a claim disputed not altogether unpersuasively by respondent), the fact remains that petitioner has had discovery of the one party he is presently opposing and, therefore, his right to additional discovery must depend on the strength of his argument that it is necessary to his case against that party.

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[20] It must be remembered that the fact that approximately six years had elapsed between the date petitioner filed his complaint and the completion of the examination of petitioner and his associates is in no way the responsibility of the trial judge. Both parties had, as previously described, entered into numerous stipulations postponing the taking of depositions for months at a time. Petitioner argues that he cannot be penalized for not working full time at supplying the defendants with deposition testimony. This is certainly correct. However, petitioner cannot, by the same token, attempt to penalize respondent for delays in which he acquiesced with no hint of objection. Certainly no one will contend that over 5½ years represents an example of the speed that a party interested in securing a swift resolution of his claims will require in order for himself and his associates to give 153 days of testimony.

While petitioner now asserts that he has been vigorously demanding discovery of the other defendants right along, the record reveals that back in 1960, on one of the occasions at which petitioner claims to have requested such discovery, his counsel stated, "I think the obvious place to begin is with Cities Service . . . and whether we need to go farther than that I don't know, and it would depend very much on what turned up there . . . ." It was only after two examinations of Cities Service personnel that petitioner finally made a formal motion for discovery of the other defendants in anticipation of Cities' renewal of its motion for summary judgment. In support of this motion petitioner was able to point to no significant evidence that he had turned up to show any dealings between Cities and the other defendants, other than the largely abandoned Kuwait oil transaction. His basic argument was, and is, simply the general proposition that in a conspiracy case the evidence is usually in the hands of the conspirators and that, therefore, he should have been permitted to examine the other alleged conspirators to see if he could obtain anything from them that would tend to link Cities to them.

It is probably true that in the ordinary conspiracy case a plaintiff would be entitled to obtain discovery against all the alleged conspirators instead of being obligated to proceed against them *seriatim*. However, in this case, by the plaintiff's own doing, one of the alleged conspirators was singled out from the rest as having joined the conspiracy at a much later date as the result of specific inducements. Being placed by petitioner's complaint in the position of being what might be termed a tangential defendant, Cities legitimately attempted to extricate itself from an expensive and protracted lawsuit. We do not mean to imply that a plaintiff should be

barred from changing the theory of his case in response to information he obtains in the course of discovery. But when the evidence so obtained shows both that the defendant is in fact tangential and that the allegations by which he was linked to the other defendants are factually incorrect, we think that a burden should indeed be placed on the party changing his theory to show a significant likelihood that discovery of the other defendants would produce evidence different from that obtained thus far. In this case petitioner has only speculation as to what discovery of the other defendants would reveal about their relations with Cities Service, and not very persuasive speculation at that, since all the evidence thus far produced by any party on this subject supports the hypothesis that Cities was opposed to the other defendants rather than in collusion with them. Accordingly, it was not error on the part of Judge Herlands on these facts to deny that portion of petitioner's motion in opposition to summary judgment that requested general discovery of all the other defendants in this case.

B.

Petitioner acknowledges the fact that he has had some discovery of Cities Service pursuant to court order. However, he contends vigorously that the discovery he has obtained has been too limited to enable him adequately to resist the motion for summary judgment. Petitioner points out that he was initially limited to taking the deposition of Hill instead of Jones, notwithstanding the fact that Jones was the person at Cities with whom he primarily dealt with regard to the Iranian oil situation. He claims prejudice from the fact that Jones died before he could be deposed in that those Cities' personnel whom he eventually deposed, namely, Watson, Frame, and Heston, were not an adequate substitute for

Jones. He also argues that he should have been allowed to depose Carter. Finally, petitioner asserts that his examination of the three executives was improperly limited in scope by Judge Herlands and that he should have been permitted general access to Cities' files for all documents in connection with Cities' activities in Iranian oil between the time he first approached Cities and 1955 in order to compensate for his inability to examine Jones.

It has already been observed [21] that the absence of testimony from Jones in this litigation is largely happenstance, since there is absolutely no indication that Judge Herlands would not have permitted him to be deposed when Watson, Frame, and Heston were examined had he been available. In addition, while it is doubtless true that Jones, as president of Cities, could have testified more authoritatively with regard to certain of the questions concerning Cities' dealings in Iranian oil, petitioner's consistent attempt to portray those Cities executives who were deposed as uninformed underlings is substantially overstated. Notwithstanding some areas of ignorance, Watson, Frame, and Heston were privy to a considerable amount of information in connection with Cities' dealings both with Iran and with the other defendants. While Jones may have been the dominant figure in the Cities operation, it is simply unrealistic for petitioner to suggest that Jones could have involved Cities in a conspiracy on the scale which is alleged to have existed here without any knowledge on the part of the other major executives of the company.

Petitioner's desire to depose Carter, which appeared for the first time in the litigation at this late date, is interesting in light of the fact that originally Carter had been listed as one of petitioner's associates and the defendants had formally noticed their intention to depose

[21] See *supra*, at 272.

him in that capacity. Petitioner does not adequately explain why, if such were in fact the case, he required a court order to examine Carter, who was not an employee of Cities. It should be emphasized in this connection that so far as appears from the record petitioner has introduced absolutely no evidence on his own behalf in this case except the deposition testimony obtained from himself and his associates by the defendants and the testimony and documents obtained from Cities pursuant to Judge Herlands' various discovery orders.

Petitioner's counsel stated in his affidavit attached to the discovery motion that Carter became an adherent of Cities immediately after petitioner filed his complaint and implied that Carter would not voluntarily testify. Assuming that to be true, although such an assumption seems open to question in view of the absence of any specific allegation to that effect, [22] no explanation is proffered as to why petitioner did not try to obtain discovery of Carter earlier if his testimony were thought necessary to petitioner's case. Petitioner was aware long before late 1964 that Cities was contending that it was not a member of any conspiracy that may have existed between the other defendants, and that it resisted being put to the expense of participating in what showed every sign of being an extremely protracted litigation. Given the fact that Judge Herlands had stated, in declining to grant Cities' original motion for summary judgment back in 1961, that he regarded petitioner's case against Cities as extremely weak, it seems quite proper to infer from the timing of petitioner's initial request to depose Carter that he did not regard Carter as someone whose

[22] In fact, the affidavit submitted by petitioner's counsel in support of his discovery motion is replete with references to the ill-use Carter allegedly suffered at the hands of Cities—rather an unpersuasive argument in support of the suggestion that in some way Cities had prevented Waldron from obtaining access to Carter.

testimony was significantly likely to help him resist a motion for summary judgment. On the contrary, the timing of the initial request suggests strongly that petitioner was more interested in establishing grounds on which to contend that Cities' motion for summary judgment should not yet be granted than he was in actually discovering what evidence Carter was in a position to furnish to him. There is no real indication, despite his arguments to the contrary, that petitioner obtained information in the course of his prior discovery that made Carter a more vital witness in 1964 than he would have been in 1961 or 1963.

As for petitioner's documentary requests, and his complaints about improper limitation of his previous discovery presented in support thereof, it is apparent that the time period to which they relate is in large part a period during which petitioner was no longer having any dealings with Cities. This is important because of two factors crucial to Waldron's conspiracy charge against respondent: first, petitioner argues that Cities joined the conspiracy when it refused to go through with a deal through him for Iranian oil, namely, in the latter part of 1952, and second, petitioner's contract with NIOC, the property right allegedly interfered with by the illegal boycott, expired in the spring of 1953. In addition, petitioner had at the time of this motion already obtained discovery of a very substantial number of documents having to do with Cities' dealings in Iranian oil prior to November 1, 1952, the latest point in time ever seriously suggested by petitioner for Cities to have joined the conspiracy.

In a proper case, of course, a party might well have the right to demand discovery of documents from an opposing party dealing with activities during a period outside that covered by the subject matter of the lawsuit

in order to provide some indication of the ramifications of the actions forming the basis of the complaint. We do not doubt that, had petitioner introduced some significant evidence that Cities had become a member of the conspiracy alleged in his complaint, more extended discovery under Rule 56 (f) of Cities' activities subsequent to its refusal to deal with him would have been proper. Likewise, given sufficient evidence of conspiracy, broader access to Cities' files for the period within which petitioner had already had discovery would have been in order. But in this case petitioner was attempting, in effect, to obtain discovery of peripheral aspects of Cities' alleged participation in the conspiracy, after having failed, despite already substantial discovery, to obtain any significant evidence of conspiracy for the period during which it was alleged to have directly injured him. It is precisely because the discovery obtainable under Rule 56 (f) [23] to oppose a motion for summary judgment would normally be less extensive in scope than the general discovery obtainable under Rule 26, that such a manner of proceeding was properly refused here.

Notwithstanding Waldron's complaints about the limitations placed on his discovery of materials and witnesses, it is evident that he has had sufficient discovery either to substantiate his claims of conspiracy to the extent of raising a material issue of fact thereon, or of providing a basis for investigation of his own to gather additional evidence during the five years for which Cities' motion was pending below. The fact that petitioner accomplished neither of these ends with the discovery he obtained is ample support for the trial judge's determination that additional discovery would be futile and would merely operate to require Cities to participate

[23] Petitioner conceded below that his discovery should proceed under Rule 56 (f) rather than Rule 26.

further in litigation in which it had been originally joined solely on the basis of conjecture.

For the foregoing reasons we hold that summary judgment was properly awarded in the courts below to respondent.

Affirmed.

MR. JUSTICE DOUGLAS took no part in the decision of this case.

MR. JUSTICE BLACK, with whom THE CHIEF JUSTICE and MR. JUSTICE BRENNAN join, dissenting.

The Court here upholds a summary judgment against a plaintiff in a suit for treble damages under the Sherman Antitrust Act. The case is a complex one in which the summary judgment was entered 11 years after the action was brought. It is strange, indeed, that during the more than 11 years before the summary judgment was entered, the defendant Cities Service should have enjoyed the luxury of never having been compelled by the court to answer the complaint, never having been required either to admit or deny the plaintiff's charges that the defendant had entered into a conspiracy to destroy plaintiff's business by boycotting it. There is one thing still stranger and more fantastic about the case; although the court permitted the defendants to interrogate the plaintiff for 153 days over a period of 5½ years, the same court refused during the 11 years to permit the plaintiff to ask any questions whatever of many of Cities' officers and employees who were most familiar with transactions about which the plaintiff complained. And all this was done in the face of our holding in *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U. S. 464, 473 (1962), that "summary procedures should be used sparingly in complex antitrust litigation" and that "[t]rial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice.' "

The following statement of the way this summary judgment was entered is sufficient, I think, to show the gross error of the Court's affirmance of the judgment.

In 1956 petitioner Waldron [1] brought suit against the Standard Oil Company (New Jersey) and six other major oil companies including Cities Service Co., the respondent here. The complaint alleged a general conspiracy beginning in 1928 on the part of all the defendants but Cities. It was alleged that Cities joined the conspiracy after the Government of Iran nationalized the properties of the Anglo-Iranian Oil Company in May 1951, and that the defendants conspired together to prevent petitioner Waldron from selling any of the Iranian oil. To carry out the boycott the alleged conspirators threatened all other companies with dire economic consequences if they dealt in the Iranian oil. Despite these threats, Cities, which did not control sources of oil adequate to supply its customers and which therefore had been compelled to buy from the major companies, expressed to petitioner a desire to obtain Iranian oil. Petitioner was offering to sell the Iranian oil on very attractive terms, and Cities agreed to go to Iran in order to evaluate the prospects, provided it received an invitation from Iranian Premier Mossadegh. Petitioner thereupon went to Iran, secured a written invitation from the Premier, and in due course the President of Cities Service, W. Alton Jones, went to Iran, taking with him other high Cities officials who, as experts, could help him appraise the possibilities of operating the old Iranian plants. Petitioner Waldron also went along. The investigation in Iran was made, but during the trip, Jones made a secret side-trip to Kuwait to pursue negotiations for buying oil from Gulf

[1] The original plaintiff Waldron, like several crucial witnesses in this case, is dead and this action is now being carried on by his executor. For the sake of clarity I will refer to the original plaintiff Waldron as the petitioner here.

Oil, one of the alleged conspirators. Jones' associates did not accompany him on this trip to Kuwait, and Cities made every effort to conceal the secret visit from petitioner. In fact, as late as 1960, during the course of this lawsuit, Cities continued to deny that Jones had ever gone to Kuwait while on the Iranian trip; the fact was not finally revealed until 1964 when petitioner was at last permitted to question some of the Cities officials who had been involved in the Iranian trip.

After the trip to Iran, Cities officials prepared a memorandum reporting favorably on the prospects for using Iranian oil, but then in October 1952 Cities abruptly informed Waldron that it had no further interest in the Iranian oil which petitioner was offering on such favorable terms. The intense pressure to which Cities was being subjected at this time by the major companies is suggested by an incident that occurred only a month later at the annual convention of the American Petroleum Institute. Jones, President of Cities, had been slated to receive the Institute's gold medal for being selected oil man of the year, but at the meetings representatives of the major companies threatened Jones that they would cut off Cities' supplies of its sorely needed crude oil if he dealt further in Iranian oil, and he was not presented with the gold medal. Three months later the agreement between Cities and Gulf for the purchase of the Kuwait oil was formally executed. Then, after petitioner's efforts to sell the Iranian oil had completely failed, the Iranian Government was forced to agree to turn over the nationalized properties to a Consortium of the major oil companies, and Cities was granted a small share in the Consortium.

Petitioner's antitrust complaint charged that Cities, which previously had eagerly pursued the prospect of purchasing Iranian oil, had changed its views and had forgone its chance to make the "billions" that Jones had

foreseen, in order to get the Kuwait oil and membership in the Consortium. After the complaint was filed, Cities examined petitioner at length, at the same time getting the court to postpone its time for answering the complaint until after these examinations could be completed. Then Cities filed affidavits charging that petitioner's allegations about the Kuwait and Consortium deals had no basis in fact and moved for summary judgment. The court deferred ruling on the summary judgment motion but at the same time refused to permit petitioner to obtain general discovery to enable him to prove his case against Cities; instead the court authorized a limited discovery relating only to the Kuwait purchase and the Consortium arrangement; petitioner's inquiry was also sharply limited both as to the subject matter and the time period of any transactions that could be questioned. At the same time the court refused to permit petitioner to take the deposition of Jones and those of his associates who had the greatest opportunity to know the reasons for the drastic change in Cities' attitude on buying Iranian oil. The Court instead ordered that only George H. Hill, a Cities vice president who had never met petitioner or known anything about the Iranian oil deal but who had been in charge of negotiating the Kuwait deal and who had led Cities' attempts to obtain a share in the Consortium, would be required to answer petitioner's questions.

After taking the deposition of Hill, petitioner filed an amended complaint which eliminated his specific reliance on the Kuwait and Consortium deals and stressed generally that Cities' participation in the conspiracy had been obtained by threats and inducements from the principal conspirators. The court again postponed a ruling on Cities' motion for summary judgment, and ordered that petitioner be permitted to make some further discovery, but once again the scope of discovery permitted

to petitioner was sharply limited. In addition, Cities' president, Jones, had died during the period when petitioner was restricted by the court's order to taking only the deposition of Hill, and thus petitioner was never able to question the one man who was the crucial figure in the alleged Iranian transactions. Of the seven other Cities officials who had been involved in these transactions, three had also died during the long period in which the court had stayed petitioner from taking their depositions.

In spite of the fact that petitioner had amassed considerable evidence of Cities' liability, in spite of the fact that Cities had been given unrestricted freedom to question petitioner while petitioner was barred from getting any information at all from Cities employees familiar with the Iranian transactions, in spite of the fact that the discovery eventually allowed to petitioner had been sharply restricted, in spite of the fact that petitioner never had an opportunity to question four of the eight Cities officials who had been most intimately connected with the alleged transactions, and in spite of the fact that Cities had never been required to answer the allegations of the complaint, the court entered summary judgment for Cities in September 1965. 38 F. R. D. 170 (1965). The Court of Appeals, in a short, uninformative opinion, affirmed the decision of the District Court. 361 F. 2d 671 (C. A. 2d Cir., 1966).

I.

The Court's action in affirming this judgment cannot possibly be reconciled with this Court's holding in *Poller* v. *Columbia Broadcasting System, supra.* There the Court warned against using summary judgments to decide complex antitrust litigation where motive and intent play leading roles. This is just such a case. Its complexity is such that even with a summary judgment it took 11 years to end it. Literally months and years were spent

in examining plaintiff, in getting affidavits and holding numerous hearings. It is little less than farcical to treat a case that eats up that much time as one suitable for a summary judgment. It certainly would not have taken one-tenth of that much time to give the case a full-dress trial, where sworn testimony before a jury rather than affidavits presented to a judge could have been used to adjudicate plaintiff's rights in accordance with due process of law. An excuse for summary judgments has always been that they save time. If the time has come when the best speed record they can make is to take 11 years to decide one of them, the idea of summary judgments as time-savers is a snare and delusion and the best service that could be rendered in this field would be to abolish summary judgment procedures, root and branch. The plain fact is that this case illustrates that the summary judgment technique tempts judges to take over the jury trial of cases, thus depriving parties of their constitutional right to trial by jury.

It seems clear to me that even with petitioner's very limited opportunity to gather evidence in support of his case, there is ample evidence in this record from which a jury could conclude that respondent Cities did indeed join the alleged conspiracy. Petitioner established that Cities needed Middle East oil, that he was offering Iranian oil on very attractive terms, and that Cities had in a number of ways manifested its considerable interest in purchasing this oil. Suddenly, Cities announced to petitioner that it did not intend to pursue the deal any further, and in fact took steps to make more difficult petitioner's efforts to sell the oil to others.[2] This refusal

[2] Thus, Cities' President, Jones, instructed an associate to cable the Secretary of the Interior to advise the United States Government against purchasing gasoline from petitioner for military use. Although in the Court's view this cable was "primarily" designed to

to deal could of course be explained by a number of motivations, but petitioner contends that this record raises the significant possibility that Cities action was predominantly motivated not by legitimate business considerations but rather by a decision to join the alleged conspiracy, induced either by threats of the conspirators or by a payoff in the form of the Kuwait and Consortium deals. The Court rejects each of these theories, although for sharply contrasting reasons, and concludes that despite the possible illegitimate motivations, evidence now in the record suggests that other motivations were, in the Court's opinion, more probable. As I have already indicated, I could never accept this as the appropriate standard, under *Poller, supra,* for determining whether a defendant in a case such as this is entitled to summary judgment.

II.

The Court in this case has deprived plaintiff of his right to discovery on highly technical and wholly indefensible grounds. The heart of the complaint here was that Cities Service and others conspired to boycott plaintiff's sale of Iranian oil by use of threats and monopoly power in violation of the antitrust acts. Rule 56 (e) comprehensively provides for the use of depositions and affidavits, and Rule 56 (f) provides that where it appears that affidavits are unavailable the Court may refuse the application for summary judgment, or may order a continuance to permit affidavits to be obtained, or make such other order as is just. Thus it appears that the

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disassociate Jones from petitioner's efforts to promote the sale, *ante,* at 284, this is certainly a rather narrow view of a cable that explicitly states, "I seriously question wisdom of such action." In any event I cannot understand how this Court can justify taking from the jury the responsibility for judging the primary purpose and effect of a piece of evidence such as this.

rules contemplate that a party may not be shut off from an opportunity to get affidavits to give him his day in court. No judge is granted power under Rule 56 or any other rule to completely deny a party all opportunity to take depositions or to get affidavits essentially needed to get a fair trial of his case. Such a course of conduct cannot possibly be called "just" within the meaning of Rule 56 (f), and yet here this plaintiff, over a course of years, repeatedly pleaded with the district judge for an opportunity to examine Jones and other Cities Service employees particularly familiar with the Iranian oil deal in order to present facts he had no other way to obtain. Of course, a party who is suing a company and who is dependent for proof on company employees must have the force of the law behind him or he cannot get testimony from such employees against their company. That the rule makers did not intend any such burdens to be imposed upon discovery is also shown by Rule 27, which even authorizes depositions to be taken, before any suit is filed, by any person who fears or expects that he may be a party to an action.

The excuse given by the trial court for cutting off plaintiff's right to discovery here will not hold water. It was that by pleading at one time that there were two possible reasons for Cities joining the conspiracy to boycott, he was perforce eternally barred from examining the defendants about any reasons other than those two in order to get more complete information as to why they conspired. To uphold this view of the District Court is to treat a lawsuit as a game in which the party who gets there first with the most questions wins the game. But lawsuits are not games. The end of each one of them, if courts remain true to the ancient traditions of justice, is to try each case in a way that permits truth to triumph. That has not been done here. This

petitioner was and is yet entitled to examine the Cities Service employees still living who know about this case. Law and justice require it. Too much time has already been wasted in an effort to provide a summary disposition of a case that should not be disposed of that way.

I would reverse the case and direct that it go to trial.

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AMALGAMATED FOOD EMPLOYEES UNION LOCAL 590 ET AL. *v.* LOGAN VALLEY PLAZA, INC., ET AL.

CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

No. 478. Argued March 14, 1968.—Decided May 20, 1968.

Respondent Weis Markets owns and operates a supermarket in a large shopping center complex owned by respondent Logan Valley Plaza. In front of Weis' building is a covered porch and a parcel pickup zone. Members of petitioner union picketed Weis' store, confining the picketing almost entirely to the parcel pickup zone and the portion of the parking area adjacent thereto. The picketing was peaceful with some sporadic and infrequent congestion of the parcel pickup area. A Pennsylvania Court of Common Pleas enjoined "picketing and trespassing upon . . . the [Weis] storeroom, porch and parcel pick-up area . . . [and] the [Logan] parking area," thus preventing picketing inside the shopping center. That court held the injunction justified in order to protect respondents' property rights and because the picketing was unlawfully aimed at coercing Weis to compel its employees to join a union. The Pennsylvania Supreme Court affirmed the issuance of the injunction on the sole ground that petitioners' conduct constituted a trespass on respondents' property. *Held:*

1. Peaceful picketing carried on in a location open generally to the public is, absent other factors involving the purpose or the manner of the picketing, protected by the First Amendment. Pp. 313–315.

2. Although there may be regulation of the manner in which handbilling, or picketing, is carried out, that does not mean that either can be barred under all circumstances on publicly owned property simply by recourse to traditional concepts of property law concerning the incidents of ownership of real property. Pp. 315–316.

3. Since the shopping center serves as the community business block "and is freely accessible and open to the people in the area and those passing through," *Marsh* v. *Alabama*, 326 U. S. 501, 508, the State may not delegate the power, through the use of trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner

and for a purpose generally consonant with the use to which the property is actually put. Pp. 316–325.

425 Pa. 382, 227 A. 2d 874, reversed and remanded.

Bernard Dunau argued the cause for petitioners. With him on the briefs was *Lester Asher*.

Robert Lewis argued the cause for respondents. With him on the brief was *Sidney Apfelbaum*.

Briefs of *amici curiae*, urging reversal, were filed by *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli*, and *Norton J. Come* for the National Labor Relations Board; by *J. Albert Woll, Laurence Gold*, and *Thomas E. Harris* for the American Federation of Labor and Congress of Industrial Organizations; by *S. G. Lippman* and *Tim Bornstein* for the Retail Clerks International Association, and by *Marvin M. Karpatkin* and *Melvin L. Wulf* for the American Civil Liberties Union.

Briefs of *amici curiae*, urging affirmance, were filed by *Fred H. Daugherty* for the International Council of Shopping Centers, Inc., and by *Charles J. Barnhill* for the American Retail Federation.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

This case presents the question whether peaceful picketing of a business enterprise located within a shopping center can be enjoined on the ground that it constitutes an unconsented invasion of the property rights of the owners of the land on which the center is situated. We granted certiorari to consider petitioners' contentions that the decisions of the state courts enjoining their picketing as a trespass are violative of their rights under the First and Fourteenth Amendments of the United States Constitution. 389 U. S. 911 (1967).[1] We reverse.

[1] Petitioners also contend (1) that the state courts were without jurisdiction in this case because the controversy involves issues that

Logan Valley Plaza, Inc. (Logan), one of the two respondents herein, owns a large, newly developed shopping center complex, known as the Logan Valley Mall, located near the City of Altoona, Pennsylvania. The shopping center is situated at the intersection of Plank Road, which is to the east of the center, and Good's Lane, which is to the south. Plank Road, also known as U. S. Route 220, is a heavily traveled highway along which traffic moves at a fairly high rate of speed. There are five entrance roads into the center, three from Plank Road and two from Good's Lane. Aside from these five entrances, the shopping center is totally separated from the adjoining roads by earthen berms. The berms are 15 feet wide along Good's Lane and 12 feet wide along Plank Road.

At the time of the events in this case, Logan Valley Mall was occupied by two businesses, Weis Markets, Inc. (Weis), the other respondent herein, and Sears, Roebuck and Co. (Sears), although other enterprises were then expected and have since moved into the center. Weis operates a supermarket and Sears operates both a department store and an automobile service center. The Weis property consists of the enclosed supermarket building, an open but covered porch along the front of the building, and an approximately five-foot-wide parcel pickup zone that runs 30 to 40 feet along the porch. The porch functions as a sidewalk in front of the building and the pickup zone is used as a temporary parking place for the loading of purchases into customers' cars by Weis employees.

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are within the exclusive jurisdiction of the National Labor Relations Board, see *Meat Cutters Local 427* v. *Fairlawn Meats, Inc.*, 353 U. S. 20 (1957), and (2) that the picketing herein was protected as a "concerted activit[y] for . . . mutual aid or protection" by § 7 of the National Labor Relations Act, as amended, 49 Stat. 452, 29 U. S. C. § 157. Because of our disposition of the case, we do not reach either contention.

Between the Weis building and the highway berms are extensive macadam parking lots with parking spaces and driveways lined off thereon. These areas, to which Logan retains title, provide common parking facilities for all the businesses in the shopping center. The distance across the parking lots to the Weis store from the entrances on Good's Lane is approximately 350 feet and from the entrances on Plank Road approximately 400 to 500 feet. The entrance on Plank Road farthest from the Weis property is the main entrance to the shopping center as a whole and is regularly used by customers of Weis. The entrance on Plank Road nearest to Weis is almost exclusively used by patrons of the Sears automobile service station into which it leads directly.

On December 8, 1965, Weis opened for business, employing a wholly nonunion staff of employees. A few days after it opened for business, Weis posted a sign on the exterior of its building prohibiting trespassing or soliciting by anyone other than its employees on its porch or parking lot. On December 17, 1965, members of Amalgamated Food Employees Union, Local 590, began picketing Weis. They carried signs stating that the Weis market was nonunion and that its employees were not "receiving union wages or other union benefits." The pickets did not include any employees of Weis, but rather were all employees of competitors of Weis. The picketing continued until December 27, during which time the number of pickets varied between four and 13 and averaged around six. The picketing was carried out almost entirely in the parcel pickup area and that portion of the parking lot immediately adjacent thereto. Although some congestion of the parcel pickup area occurred, such congestion was sporadic and infrequent.[2]

[2] Such congestion as there may have been was regulated by portions of the order not here challenged. See n. 4, *infra*.

The picketing was peaceful at all times and unaccompanied by either threats or violence.

On December 27, Weis and Logan instituted an action in equity in the Court of Common Pleas of Blair County, and that court immediately issued an *ex parte* order enjoining petitioners [3] from, *inter alia*, "[p]icketing and trespassing upon . . . the [Weis] storeroom, porch and parcel pick-up area . . . [and] the [Logan] parking area and all entrances and exits leading to said parking area." [4] The effect of this order was to require that all picketing be carried on along the berms beside the public roads outside the shopping center. Picketing continued along the berms and, in addition, handbills asking the public not to patronize Weis because it was nonunion were distributed, while petitioners contested the validity of the *ex parte* injunction. After an evidentiary hearing, which resulted in the establishment of the facts set forth above, the Court of Common Pleas continued indefinitely its original *ex parte* injunction without modification.[5]

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[3] In addition to Local 590, the petitioners herein are various members and officials of the local who were engaged in the picketing in one way or another.

[4] The court also enjoined petitioners from blocking access by anyone to respondents' premises, making any threats or using any violence against customers, employees, and suppliers of Weis, and physically interfering with the performance by Weis employees of their duties. Petitioners make no challenge to these parts of the order and it appears conceded that there has been no subsequent picketing by petitioners in violation of these provisions. A portion of the order also directs that no more than "—— pickets" be used at any one time, but no number has ever been inserted into the blank space and thus no limitation appears to have ever been imposed.

[5] We need not concern ourselves with deciding whether the injunction is to be characterized as permanent or temporary. Since the order provides in terms that it shall remain in effect until further modification by the court and since there is no indication that any modification affecting the issues presently before us will be forth-

That court explicitly rejected petitioners' claim under the First Amendment that they were entitled to picket within the confines of the shopping center, and their contention that the suit was within the primary jurisdiction of the NLRB. The trial judge held that the injunction was justified both in order to protect respondents' property rights and because the picketing was unlawfully aimed at coercing Weis to compel its employees to join a union. On appeal the Pennsylvania Supreme Court, with three Justices dissenting, affirmed the issuance of the injunction on the sole ground that petitioners' conduct constituted a trespass on respondents' property.[6]

We start from the premise that peaceful picketing carried on in a location open generally to the public is, absent other factors involving the purpose or manner of the picketing, protected by the First Amendment. *Thornhill* v. *Alabama,* 310 U. S. 88 (1940); *AFL* v. *Swing,* 312 U. S. 321 (1941); *Bakery Drivers Local 802* v. *Wohl,* 315 U. S. 769 (1942); *Teamsters Local 795* v. *Newell,* 356 U. S. 341 (1958). To be sure, this Court has noted that picketing involves elements of both speech and conduct, *i. e.,* patrolling, and has indicated that because of this intermingling of protected and unprotected elements, picketing can be subjected to controls that would not be constitutionally permissible in the case of pure speech. See, *e. g., Hughes* v. *Superior Court,* 339 U. S. 460 (1950); *International Bro. of Teamsters* v. *Vogt, Inc.,* 354 U. S. 284 (1957); *Cox* v. *Louisiana,* 379 U. S. 559 (1965); *Cameron* v. *Johnson,* 390 U. S. 611.

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coming at any time in the near future, the judgment below upholding the issuance of the injunction is clearly final for purposes of review by this Court. Compare *Construction Laborers' Local 438* v. *Curry,* 371 U. S. 542 (1963).

[6] Petitioners did not argue their pre-emption contentions in their brief before the Pennsylvania Supreme Court and, accordingly, that court does not appear to have passed on them.

Nevertheless, no case decided by this Court can be found to support the proposition that the nonspeech aspects of peaceful picketing are so great as to render the provisions of the First Amendment inapplicable to it altogether.

The majority of the cases from this Court relied on by respondents, in support of their contention that picketing can be subjected to a blanket prohibition in some instances by the States, involved picketing that was found either to have been directed at an illegal end, *e. g., Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490 (1949); *Building Service Employees Local 262* v. *Gazzam*, 339 U. S. 532 (1950); *Plumbers Local 10* v. *Graham*, 345 U. S. 192 (1953), or to have been directed at coercing a decision by an employer which, although in itself legal, could validly be required by the State to be left to the employer's free choice, *e. g., Carpenters Local 213* v. *Ritter's Cafe*, 315 U. S. 722 (1942) (secondary boycott); *Teamsters Local 309* v. *Hanke*, 339 U. S. 470 (1950) (self-employer union shop). Compare *NLRB* v. *Denver Bldg. & Const. Trades Council*, 341 U. S. 675 (1951), and *International Bro. of Electrical Workers* v. *NLRB*, 341 U. S. 694 (1951).

Those cases are not applicable here because they all turned on the purpose for which the picketing was carried on, not its location. In this case the Pennsylvania Supreme Court specifically disavowed reliance on the finding of unlawful purpose on which the trial court alternatively based its issuance of the injunction.[7] It did emphasize that the pickets were not employees of Weis and were discouraging the public from patroniz-

[7] Needless to say, had the Pennsylvania Supreme Court relied on the purpose of the picketing and held it to be illegal, substantial questions of pre-emption under the federal labor laws would have been presented. Compare *Hotel Employees Local 255* v. *Sax Enterprises, Inc.*, 358 U. S. 270 (1959).

ing the Weis market. However, those facts could in no way provide a constitutionally permissible independent basis for the decision because this Court has previously specifically held that picketing of a business enterprise cannot be prohibited on the *sole* ground that it is conducted by persons not employees whose purpose is to discourage patronage of the business. *AFL* v. *Swing,* 312 U. S. 321 (1941). Compare *Bakery Drivers Local 802* v. *Wohl,* 315 U. S. 769 (1942). Rather, those factors merely supported the court's finding of a trespass by demonstrating that the picketing took place without the consent, and against the will, of respondents.

The case squarely presents, therefore, the question whether Pennsylvania's generally valid rules against trespass to private property can be applied in these circumstances to bar petitioners from the Weis and Logan premises. It is clear that if the shopping center premises were not privately owned but instead constituted the business area of a municipality, which they to a large extent resemble, petitioners could not be barred from exercising their First Amendment rights there on the sole ground that title to the property was in the municipality. *Lovell* v. *Griffin,* 303 U. S. 444 (1938); *Hague* v. *CIO,* 307 U. S. 496 (1939); *Schneider* v. *State,* 308 U. S. 147 (1939); *Jamison* v. *Texas,* 318 U. S. 413 (1943). The essence of those opinions is that streets, sidewalks, parks, and other similar public places are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely.

The fact that *Lovell, Schneider,* and *Jamison* were concerned with handbilling rather than picketing is immaterial so far as the question is solely one of right of access for the purpose of expression of views. Handbilling, like picketing, involves conduct other than speech,

namely, the physical presence of the person distributing leaflets on municipal property. If title to municipal property is, standing alone, an insufficient basis for prohibiting all entry onto such property for the purpose of distributing printed matter, it is likewise an insufficient basis for prohibiting all entry for the purpose of carrying an informational placard. While the patrolling involved in picketing may in some cases constitute an interference with the use of public property greater than that produced by handbilling, it is clear that in other cases the converse may be true. Obviously, a few persons walking slowly back and forth holding placards can be less obstructive of, for example, a public sidewalk than numerous persons milling around handing out leaflets. That the manner in which handbilling, or picketing, is carried out may be regulated does not mean that either can be barred under all circumstances on publicly owned property simply by recourse to traditional concepts of property law concerning the incidents of ownership of real property.

This Court has also held, in *Marsh* v. *Alabama,* 326 U. S. 501 (1946), that under some circumstances property that is privately owned may, at least for First Amendment purposes, be treated as though it were publicly held. In *Marsh,* the appellant, a Jehovah's Witness, had undertaken to distribute religious literature on a sidewalk in the business district of Chickasaw, Alabama. Chickasaw, a so-called company town, was wholly owned by the Gulf Shipbuilding Corporation. "The property consists of residential buildings, streets, a system of sewers, a sewage disposal plant and a 'business block' on which business places are situated. . . . [T]he residents use the business block as their regular shopping center. To do so, they now, as they have for many years, make use of a company-owned paved street and sidewalk located alongside the store fronts in order to enter and

leave the stores and the post office. Intersecting company-owned roads at each end of the business block lead into a four-lane public highway which runs parallel to the business block at a distance of thirty feet. There is nothing to stop highway traffic from coming onto the business block and upon arrival a traveler may make free use of the facilities available there. In short the town and its shopping district are accessible to and freely used by the public in general and there is nothing to distinguish them from any other town and shopping center except the fact that the title to the property belongs to a private corporation." 326 U. S., at 502–503.

The corporation had posted notices in the stores stating that the premises were private property and that no solicitation of any kind without written permission would be permitted. Appellant Marsh was told that she must have a permit to distribute her literature and that a permit would not be granted to her. When she declared that the company rule could not be utilized to prevent her from exercising her constitutional rights under the First Amendment, she was ordered to leave Chickasaw. She refused to do so and was arrested for violating Alabama's criminal trespass statute. In reversing her conviction under the statute, this Court held that the fact that the property from which appellant was sought to be ejected for exercising her First Amendment rights was owned by a private corporation rather than the State was an insufficient basis to justify the infringement on appellant's right to free expression occasioned thereby. Likewise the fact that appellant Marsh was herself not a resident of the town was not considered material.

The similarities between the business block in *Marsh* and the shopping center in the present case are striking. The perimeter of Logan Valley Mall is a little less than 1.1 miles. Inside the mall were situated, at the time of trial, two substantial commercial enterprises with nu-

merous others soon to follow.[8] Immediately adjacent to the mall are two roads, one of which is a heavily traveled state highway and from both of which lead entrances directly into the mall. Adjoining the buildings in the middle of the mall are sidewalks for the use of pedestrians going to and from their cars and from building to building. In the parking areas, roadways for the use of vehicular traffic entering and leaving the mall are clearly marked out. The general public has unrestricted access to the mall property. The shopping center here is clearly the functional equivalent of the business district of Chickasaw involved in *Marsh*.

It is true that, unlike the corporation in *Marsh*, the respondents here do not own the surrounding residential property and do not provide municipal services therefor. Presumably, petitioners are free to canvass the neighborhood with their message about the nonunion status of Weis Market, just as they have been permitted by the state courts to picket on the berms outside the mall. Thus, unlike the situation in *Marsh*, there is no power on respondents' part to have petitioners totally denied access to the community for which the mall serves as a business district. This fact, however, is not determinative. In *Marsh* itself the precise issue presented was whether the appellant therein had the right, under the First Amendment, to pass out leaflets in the business district, since there was no showing made there that the corporate owner would have sought to prevent the distribution of leaflets in the residential areas of the town. While it is probable that the power to prevent trespass broadly claimed in *Marsh* would have encompassed such an incursion into the residential areas, the specific facts in the case involved access to property used for commercial purposes.

[8] We are informed that, in addition to Weis and Sears, 15 other commercial establishments are presently situated in the shopping center.

We see no reason why access to a business district in a company town for the purpose of exercising First Amendment rights should be constitutionally required, while access for the same purpose to property functioning as a business district should be limited simply because the property surrounding the "business district" is not under the same ownership. Here the roadways provided for vehicular movement within the mall and the sidewalks leading from building to building are the functional equivalents of the streets and sidewalks of a normal municipal business district. The shopping center premises are open to the public to the same extent as the commercial center of a normal town. So far as can be determined, the main distinction in practice between use by the public of the Logan Valley Mall and of any other business district, were the decisions of the state courts to stand, would be that those members of the general public who sought to use the mall premises in a manner contrary to the wishes of the respondents could be prevented from so doing.

Such a power on the part of respondents would be, of course, part and parcel of the rights traditionally associated with ownership of private property. And it may well be that respondents' ownership of the property here in question gives them various rights, under the laws of Pennsylvania, to limit the use of that property by members of the public in a manner that would not be permissible were the property owned by a municipality. All we decide here is that because the shopping center serves as the community business block "and is freely accessible and open to the people in the area and those passing through," *Marsh* v. *Alabama,* 326 U. S., at 508, the State may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose

generally consonant with the use to which the property is actually put.[9]

We do not hold that respondents, and at their behest the State, are without power to make reasonable regulations governing the exercise of First Amendment rights on their property. Certainly their rights to make such regulations are at the very least co-extensive with the powers possessed by States and municipalities, and recognized in many opinions of this Court, to control the use of public property. Thus where property is not ordinarily open to the public, this Court has held that access to it for the purpose of exercising First Amendment rights may be denied altogether. See *Adderley* v. *Florida*, 385 U. S. 39 (1966). Even where municipal or state property is open to the public generally, the exercise of First Amendment rights may be regulated so as to prevent interference with the use to which the property is ordinarily put by the State. Thus we have upheld a statute prohibiting picketing "in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from any . . . county . . . courthouses." *Cameron* v. *Johnson*, 390 U. S. 611, 616. Likewise it has been indicated that persons could be constitutionally prohibited from picketing "in or near" a court "with the intent of interfering with, obstructing, or impeding the administration of justice." *Cox* v. *Louisiana*, 379 U. S. 559 (1965).

In addition, the exercise of First Amendment rights may be regulated where such exercise will unduly inter-

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[9] The picketing carried on by petitioners was directed specifically at patrons of the Weis Market located within the shopping center and the message sought to be conveyed to the public concerned the manner in which that particular market was being operated. We are, therefore, not called upon to consider whether respondents' property rights could, consistently with the First Amendment, justify a bar on picketing which was not thus directly related in its purpose to the use to which the shopping center property was being put.

fere with the normal use of the public property by other members of the public with an equal right of access to it. Thus it has been held that persons desiring to parade along city streets may be required to secure a permit in order that municipal authorities be able to limit the amount of interference with use of the sidewalks by other members of the public by regulating the time, place, and manner of the parade. *Cox* v. *New Hampshire,* 312 U. S. 569 (1941); *Poulos* v. *New Hampshire,* 345 U. S. 395 (1953). Compare *Kovacs* v. *Cooper,* 336 U. S. 77 (1949) (use of sound trucks making "loud and raucous noises" on public streets may be prohibited).

However, none of these cases is applicable to the present case. Because the Pennsylvania courts have held that "picketing and trespassing" can be prohibited absolutely on respondents' premises, we have no occasion to consider the extent to which respondents are entitled to limit the location and manner of the picketing or the number of pickets within the mall in order to prevent interference with either access to the market building or vehicular use of the parcel pickup area and parking lot.[10] Likewise, *Adderley* furnishes no support for the decision below because it is clear that the public has virtually unrestricted access to the property at issue here. Respondents seek to defend the injunction they have obtained by characterizing the requirement that picketing be carried on outside the Logan Mall premises as a regulation rather than a suppression of it. Accepting *arguendo* such a characterization, the question remains, under the First Amendment, whether it is a permissible regulation.

Petitioners' picketing was directed solely at one establishment within the shopping center. The berms sur-

[10] Compare *Cox* v. *New Hampshire, supra; Cox* v. *Louisiana, supra; Cameron* v. *Johnson, supra.* It should be noted that portions of the injunction, not contested here by petitioners, do accomplish precisely such a regulation of the picketing. See n. 4, *supra.*

rounding the center are from 350 to 500 feet away from the Weis store. All entry onto the mall premises by customers of Weis, so far as appears, is by vehicle from the roads alongside which the berms run. Thus the placards bearing the message which petitioners seek to communicate to patrons of Weis must be read by those to whom they are directed either at a distance so great as to render them virtually indecipherable—where the Weis customers are already within the mall—or while the prospective reader is moving by car from the roads onto the mall parking areas via the entrance ways cut through the berms. In addition, the pickets are placed in some danger by being forced to walk along heavily traveled roads along which traffic moves constantly at rates of speed varying from moderate to high. Likewise, the task of distributing handbills to persons in moving automobiles is vastly greater (and more hazardous) than it would be were petitioners permitted to pass them out within the mall to pedestrians.[11] Finally, the require-

[11] Respondents argue that this case does not involve petitioners' right to distribute handbills, notwithstanding that the provision of the injunction prohibiting trespassing would seem to encompass entry for the purpose of distributing leaflets, because the petitioners were never engaged in handbilling within the mall. Similarly respondents suggest that the only question concerning picketing in this case relates to the picketing carried on in the parcel pickup area, since almost all the picketing occurred there prior to the issuance of the injunction. We reject the notion that an injunction that by its terms clearly prohibits entry onto the entire mall premises to picket should be given the reading suggested by the respondents simply because it is broader than the facts at the time required. The injunction is presently still operative and no limiting construction has been placed on it by the Pennsylvania courts. We see nothing to suggest that petitioners could not be immediately cited for contempt if they violated the plain terms of the injunction, whatever its relationship to their previous conduct may be. As for handbilling, the opinion of the trial court reveals that it was prepared to enjoin the handbilling being carried on along

ment that the picketing take place outside the shopping center renders it very difficult for petitioners to limit its effect to Weis only.[12]

It is therefore clear that the restraints on picketing and trespassing approved by the Pennsylvania courts here substantially hinder the communication of the ideas which petitioners seek to express to the patrons of Weis. The fact that the nonspeech aspects of petitioners' activity are also rendered less effective is not particularly compelling in light of the absence of any showing, or reliance by the state courts thereon, that the patrolling accompanying the picketing sought to be carried on was significantly interfering with the use to which the mall property was being put by both respondents and the general public.[13] As we observed earlier, the mere fact that speech is accompanied by conduct does not mean that the speech can be suppressed under the guise of prohibiting the conduct. Here it is perfectly clear that a prohibition against trespass on the mall operates to bar all speech within the shopping center to which respondents object. Yet this Court stated many years ago, "[O]ne is not to have the exercise of his liberty

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the berms had respondents so requested. Given that, the suggestion that the absolute prohibition against petitioners' trespassing on the mall does not include handbilling is likewise untenable. We do not treat petitioners' right to distribute leaflets separately in this opinion simply because a holding that petitioners are entitled to picket within the mall obviously extends to handbilling as well and also because petitioners themselves make no separate issue of it.

[12] Petitioners point out that they could conceivably find themselves charged with conducting an illegal secondary boycott if they do not comply with the rules laid down by the NLRB and the courts governing common situs picketing. Compare *Electrical Workers Local 761* v. *NLRB*, 366 U. S. 667 (1961).

[13] Moreover, the parts of the injunction not contested by petitioners already went a long way towards preventing any such interference. See n. 4, *supra*.

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of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider* v. *State*, 308 U. S. 147, 163 (1939).

The sole justification offered for the substantial interference with the effectiveness of petitioners' exercise of their First Amendment rights to promulgate their views through handbilling and picketing is respondents' claimed absolute right under state law to prohibit any use of their property by others without their consent. However, unlike a situation involving a person's home, no meaningful claim to protection of a right of privacy can be advanced by respondents here. Nor on the facts of the case can any significant claim to protection of the normal business operation of the property be raised. Naked title is essentially all that is at issue.

The economic development of the United States in the last 20 years reinforces our opinion of the correctness of the approach taken in *Marsh*. The large-scale movement of this country's population from the cities to the suburbs has been accompanied by the advent of the suburban shopping center, typically a cluster of individual retail units on a single large privately owned tract. It has been estimated that by the end of 1966 there were between 10,000 and 11,000 shopping centers in the United States and Canada, accounting for approximately 37% of the total retail sales in those two countries.[14]

These figures illustrate the substantial consequences for workers seeking to challenge substandard working conditions, consumers protesting shoddy or overpriced merchandise, and minority groups seeking nondiscriminatory hiring policies that a contrary decision here would have. Business enterprises located in downtown areas would be subject to on-the-spot public criti-

[14] Kaylin, A Profile of the Shopping Center Industry, Chain Store Age, May 1966, at 17.

cism for their practices, but businesses situated in the suburbs could largely immunize themselves from similar criticism by creating a *cordon sanitaire* of parking lots around their stores. Neither precedent nor policy compels a result so at variance with the goal of free expression and communication that is the heart of the First Amendment.

Therefore, as to the sufficiency of respondents' ownership of the Logan Valley Mall premises as the sole support of the injunction issued against petitioners, we simply repeat what was said in *Marsh* v. *Alabama,* 326 U. S., at 506, "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." Logan Valley Mall is the functional equivalent of a "business block" and for First Amendment purposes must be treated in substantially the same manner.[15]

The judgment of the Supreme Court of Pennsylvania is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE DOUGLAS, concurring.

Picketing on the public walkways and parking area in respondents' shopping center presents a totally different question from an invasion of one's home or place

[15] A number of state courts have reached similar conclusions as to shopping centers. See, *e. g., Schwartz-Torrance Investment Corp.* v. *Bakery Workers Local 31,* 61 Cal. 2d 766, 394 P. 2d 921 (1964), cert. denied, 380 U. S. 906 (1965); *Moreland Corp.* v. *Retail Store Employees Local 444,* 16 Wis. 2d 499, 114 N. W. 2d 876 (1962). Compare *Amalgamated Clothing Workers* v. *Wonderland Shopping Center, Inc.,* 370 Mich. 547, 122 N. W. 2d 785 (1963) (affirming four-to-four a lower court holding that handbilling in a shopping center is protected by the First Amendment).

of business. While Logan Valley Mall is not dedicated to public use to the degree of the "company town" in *Marsh* v. *Alabama,* 326 U. S. 501, it is clear that respondents have opened the shopping center to public uses. They hold out the mall as "public" for purposes of attracting customers and facilitating delivery of merchandise. Picketing in regard to labor conditions at the Weis Supermarket is directly related to that shopping center business. Why should respondents be permitted to avoid this incidence of carrying on a public business in the name of "private property"? It is clear to me that they may not, when the public activity sought to be prohibited involves constitutionally protected expression respecting their business.

Picketing is free speech *plus,* the *plus* being physical activity that may implicate traffic and related matters. Hence the latter aspects of picketing may be regulated. See *Bakery Drivers Local* v. *Wohl,* 315 U. S. 769, 776–777 (concurring opinion); *Hughes* v. *Superior Court,* 339 U. S. 460, 464–465; *Building Service Union* v. *Gazzam,* 339 U. S. 532, 536–537. Thus, the provisions of the injunction in this case which prohibit the picketers from interfering with employees, deliverymen, and customers are proper. It is said that the picketers may be banished to the publicly owned berms, several hundred feet from the target of their criticism. But that is to make "private property" a sanctuary from which some members of the public may be excluded merely because of the ideas they espouse. Logan Valley Mall covers several acres and the number of picketers at any time has been small. The courts of Pennsylvania are surely capable of fashioning a decree that will ensure noninterference with customers and employees, while enabling the union members to assemble sufficiently close to Weis' market to make effective the exercise of their First Amendment rights.

MR. JUSTICE BLACK, dissenting.

While I generally accept the factual background of this case presented in the Court's opinion, I think it is important to focus on just where this picketing which was enjoined by the state courts was actually taking place. The following extract is taken from the trial court's "Findings of Fact": [1]

> "(7) . . .
>
> "(a) small groups of men and women wearing placards . . . walked back and forth in front of the Weis supermarket, more particularly *in the pick-up zone* adjacent to the covered porch [emphasis added];
>
> "(b) occasional picketing as above described has taken place *on the covered porch itself* [emphasis added]";

Respondent Weis Markets, Inc., the owner-occupant of the supermarket here being picketed, owns the real property on which it constructed its store, porch, and parcel pickup zone. Respondent Logan Valley Plaza, Inc., owns the other property in the shopping center, including the large area which has been paved and marked off as a general parking lot for customers of the shopping center.

Anyone familiar with the operations of a modern-day supermarket knows the importance of the so-called "pick-up zone"—an area where the frequently numerous bags of groceries bought in the store can be loaded conveniently into the customers' cars. The phenomenon of the supermarket combined with widespread ownership of automobiles and refrigeration facilities has made the purchase of large quantities of groceries on a single

[1] This appears in the opinion of the Court of Common Pleas of Blair County, Pennsylvania, dated February 14, 1966, and unreported.

shopping trip a common occurrence in this country. And in line with this trend the stores have had to furnish adequate loading areas and facilities including in many instances, such as here for example, extra employees to assist in loading customers' cars. Respondent Weis' parcel pickup zone is fairly typical of the type of loading area that has been provided: it is located alongside the front of the store and is 4 to 5 feet wide, 30 to 40 feet in length, and is marked off with bold double yellow lines; the words "Parcel Pick-Up" are printed in large letters in the zone. Testimony at trial showed that this pickup area was used "strictly for customers to come and enter to pick up their parcels which they had purchased. . . . They drive into this particular area, and there the groceries are loaded into the cars by [Weis employees] on . . . pick-up duty."

It seems clear to me, in light of the customary way that supermarkets now must operate, that pickup zones are as much a part of these stores as the inside counters where customers select their goods or the check-out and bagging sections where the goods are paid for. I cannot conceive how such a pickup zone, even by the wildest stretching of *Marsh* v. *Alabama*, 326 U. S. 501, could ever be considered dedicated to the public or to pickets. The very first section of the injunction issued by the trial court in this case recognizes this fact and is aimed only at protecting this clearly private property from trespass by the pickets. Thus the order of the court separately enjoins petitioners from:

> "(a) Picketing and trespassing upon the private property of the plaintiff Weis Markets, Inc., Store No. 40, located at Logan Valley Mall, Altoona, Pennsylvania, including as such private property the storeroom, porch and parcel pick-up area."

While there is language in the majority opinion which indicates that the state courts may still regulate picket-

ing on respondent Weis' private property,[2] this is not sufficient. I think that this Court should declare unequivocally that Section (a) of the lower court's injunction is valid under the First Amendment and that petitioners cannot, under the guise of exercising First Amendment rights, trespass on respondent Weis' private property for the purpose of picketing.[3] It would be just as sensible for this Court to allow the pickets to stand on the check-out counters, thus interfering with customers who wish to pay for their goods, as it is to approve picketing in the pickup zone which interferes with customers' loading of their cars. At the very least, this wholly severable part of the injunction aimed at the pickup zone should be affirmed by the Court as valid under the First Amendment. And this is in fact the really important part of the injunction since, as the Court's opinion admits, "[t]he picketing was carried out almost entirely in the parcel pickup area and that portion of the parking lot immediately adjacent thereto."

I would go further, however, and hold that the entire injunction is valid.[4] With the exception of the Weis

[2] The majority opinion contains the following statement: "Because the Pennsylvania courts have held that 'picketing and trespassing' can be prohibited absolutely on respondents' premises, we have no occasion to consider the extent to which respondents are entitled to limit the location and manner of the picketing or the number of pickets within the mall in order to prevent interference with either access to the market building or vehicular use of the parcel pickup area and parking lot." *Ante*, at 321. This statement ignores the fact that the injunction order of the Common Pleas Court contains separately designated sections which are easily divisible.

[3] Since the majority opinion does not reach any issue under the National Labor Relations Act, 29 U. S. C. § 141 *et seq.*, neither do I. My declaration concerning the validity of the injunction is concerned with the First and Fourteenth Amendments. I do not find that the injunction, and most importantly § (a), violates any First Amendment rights.

[4] See n. 3, *supra*.

property mentioned above, the land on which this shopping center (composed of only two stores at the time of trial and approximately 17 now) is located is owned by respondent Logan Valley Plaza, Inc. Logan has improved its property by putting shops and parking spaces thereon for the use of business customers. Now petitioners contend that they can come onto Logan's property for the purpose of picketing and refuse to leave when asked, and that Logan cannot use state trespass laws to keep them out. The majority of this Court affirms petitioners' contentions. But I cannot accept them, for I believe that, whether this Court likes it or not, the Constitution recognizes and supports the concept of private ownership of property. The Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." This means to me that there is no right to picket on the private premises of another to try to convert the owner or others to the views of the pickets. It also means, I think, that if this Court is going to arrogate to itself the power to act as the Government's agent to take a part of Weis' property to give to the pickets for their use, the Court should also award Weis just compensation for the property taken.

In affirming petitioners' contentions the majority opinion relies on *Marsh* v. *Alabama, supra,* and holds that respondents' property has been transformed to some type of public property. But *Marsh* was never intended to apply to this kind of situation. *Marsh* dealt with the very special situation of a company-owned town, complete with streets, alleys, sewers, stores, residences, and everything else that goes to make a town. The particular company town involved was Chickasaw, Alabama, which, as we stated in the opinion, except for the fact

that it "is owned by the Gulf Shipbuilding Corporation . . . has all the characteristics of any other American town. The property consists of residential buildings, streets, a system of sewers, a sewage disposal plant and a 'business block' on which business places are situated." 326 U. S., at 502. Again toward the end of the opinion we emphasized that "the town of Chickasaw does not function differently from any other town." 326 U. S., at 508. I think it is fair to say that the basis on which the *Marsh* decision rested was that the property involved encompassed an area that for all practical purposes had been turned into a town; the area had all the attributes of a town and was exactly like any other town in Alabama. I can find very little resemblance between the shopping center involved in this case and Chickasaw, Alabama. There are no homes, there is no sewage disposal plant, there is not even a post office on this private property which the Court now considers the equivalent of a "town." [5] Indeed, at the time this injunction was issued, there were only two stores on the property. Now there are supposed to be about 17, but they are all conceded to be "commercial establishments." The remainder of the property in the center has been laid out as a large parking lot with individually marked parking spaces provided for business customers. All I can say is that this sounds like a very strange "town" to me.

The majority opinion recognizes the problem with trying to draw too close an analogy to *Marsh*, but faces a dilemma in that *Marsh* is the only possible authority for treating admittedly privately owned property the way the majority does. Thus the majority opinion concedes that "the respondents here do not own the

[5] In *Marsh* v. *Alabama, supra,* a deputy of the Mobile County Sheriff, paid by the company, served as the town's policeman. We are not told whether the Logan Valley Plaza shopping center had its own policeman.

surrounding residential property and do not provide municipal services therefor." But that is not crucial, according to the majority, since the petitioner in *Marsh* was arrested in the business district of Chickasaw. The majority opinion then concludes that since the appellant in *Marsh* was given access to the business district of a company town, the petitioners in this case should be given access to the shopping center which was functioning as a business district. But I respectfully suggest that this reasoning completely misreads *Marsh* and begs the question. The question is, Under what circumstances can private property be treated as though it were public? The answer that *Marsh* gives is when that property has taken on *all* the attributes of a town, *i. e.*, "residential buildings, streets, a system of sewers, a sewage disposal plant and a 'business block' on which business places are situated." 326 U. S., at 502. I can find nothing in *Marsh* which indicates that if one of these features is present, *e. g.*, a business district, this is sufficient for the Court to confiscate a part of an owner's private property and give its use to people who want to picket on it.

In allowing the trespass here, the majority opinion indicates that Weis and Logan invited the public to the shopping center's parking lot. This statement is contrary to common sense. Of course there was an implicit invitation for customers of the adjacent stores to come and use the marked off places for cars. But the whole public was no more wanted there than they would be invited to park free at a pay parking lot. Is a store owner or are several owners together less entitled to have a parking lot set aside for customers than other property owners? To hold that store owners are compelled by law to supply picketing areas for pickets to drive store customers away is to create a court-made law wholly disregarding the constitutional basis on which private

ownership of property rests in this country. And of course picketing, that is patrolling, is not free speech and not protected as such. *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490; *Hughes* v. *Superior Court*, 339 U. S. 460. These pickets do have a constitutional right to speak about Weis' refusal to hire union labor, but they do not have a constitutional right to compel Weis to furnish them a place to do so on its property. *Cox* v. *Louisiana*, 379 U. S. 559; *Adderley* v. *Florida*, 385 U. S. 39; *Cameron* v. *Johnson*, 390 U. S. 611.

For these reasons I respectfully dissent.

MR. JUSTICE HARLAN, dissenting.

The petitioners argue for reversal of the decision below on two separate grounds: first, that petitioners' picketing was protected by the First Amendment from state injunctive interference of this kind; second, that the Pennsylvania courts have strayed into a sphere where the power of initial decision is reserved by federal labor laws to the National Labor Relations Board. I think that, if available, the second or "pre-emption" ground would plainly be a preferable basis for decision. Because reliance on pre-emption would invoke the authority of a federal statute through the Constitution's Supremacy Clause, it would avoid interpretation of the Constitution itself, which would be necessary if the case were treated under the First Amendment. See, *e. g.*, *Zschernig* v. *Miller*, 389 U. S. 429, 443, 444–445 (opinion of the writer concurring in the result). Dependence on pre-emption would also assure that the Court does not itself disrupt the statutory scheme of labor law established by the Congress, a point to which I shall return.

On the merits, it seems clear from the facts stated by the Court, see *ante*, at 310–312, and from our past decisions [1]

[1] See, *e. g.*, *Construction Laborers* v. *Curry*, 371 U. S. 542, 546–548; *Hotel Employees Local 255* v. *Sax Enterprises, Inc.*, 358 U. S.

that the petitioners have a substantial pre-emption claim. However, upon examination of the record I have come reluctantly to the conclusion that this Court is precluded from reaching the merits of that question because of the petitioners' failure to raise any such issue in the Pennsylvania Supreme Court. The rule that in cases coming from state courts this Court may review only those issues which were presented to the state court is not discretionary but jurisdictional. Section 1257 of Title 28, which defines this Court's certiorari jurisdiction, states:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court . . . [b]y writ of certiorari, . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of . . . the United States."

Since the Pennsylvania Supreme Court did not advert in its majority opinion to the pre-emption issue,[2] it is necessary to determine whether that question was "specially set up or claimed" within the meaning of § 1257. In deciding that question, it is relevant and usually sufficient to ask whether the petitioners satisfied the state rules governing presentation of issues. See, *e. g.*, *Beck* v. *Washington*, 369 U. S. 541, 549–554; *Wolfe* v. *North*

270; *Youngdahl* v. *Rainfair, Inc.*, 355 U. S. 131, 139; *NLRB* v. *Babcock & Wilcox Co.*, 351 U. S. 105, 112–114; *NLRB* v. *Stowe Spinning Co.*, 336 U. S. 226, 229–232; cf. *Amalgamated Meat Cutters* v. *Fairlawn Meats, Inc.*, 353 U. S. 20, 24–25. See also *Marshall Field & Co.*, 98 N. L. R. B. 88, 93, enforced as modified *sub nom. Marshall Field & Co.* v. *NLRB*, 200 F. 2d 375, 380.

[2] Where the highest state court has actually ruled on a federal question, this Court's concern with the proper raising of the question in the state court disappears. See, *e. g.*, *Raley* v. *Ohio*, 360 U. S. 423, 436; *Whitney* v. *California*, 274 U. S. 357, 360–361; *Manhattan Life Ins. Co.* v. *Cohen*, 234 U. S. 123, 134.

Carolina, 364 U. S. 177, 195; *John* v. *Paullin,* 231 U. S. 583, 585.[3] Rule 59 of the Pennsylvania Supreme Court provides:

> "The [appellant's] statement of the questions involved must set forth each question separately, in the briefest and most general terms . . . . This rule is to be considered in the highest degree mandatory, admitting no exception; ordinarily no point will be considered which is not thus set forth in or necessarily suggested by the statement of questions involved."

The Pennsylvania Supreme Court has consistently held that it will not consider points not presented in the manner prescribed by this rule, and that such points are regarded as abandoned or waived.[4] In this case, the petitioners' statement of questions involved did not refer to the possibility of federal pre-emption,[5] and of course the Pennsylvania Supreme Court's majority opinion did not mention it either. A similar rule of the Washington

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[3] The only circumstances in which a federal claim will be entertained despite the petitioners' failure to raise it below in the prescribed manner are when the State's rules do not afford a reasonable opportunity for a hearing on the federal issue, see, *e. g., Central Union Tel. Co.* v. *Edwardsville,* 269 U. S. 190, 194–195, or are applied in a discriminatory fashion to evade the federal claim, see, *e. g., Hartford Life Ins. Co.* v. *Johnson,* 249 U. S. 490, 493. No such allegation is made in this case.

[4] See, *e. g., Dunmore* v. *McMillan,* 396 Pa. 472, 152 A. 2d 708; *Kuhns* v. *Brugger,* 390 Pa. 331, 135 A. 2d 395; *Kerr* v. *O'Donovan,* 389 Pa. 614, 134 A. 2d 213.

[5] The petitioners stated that the question involved was:

"Did the lower court err in granting a Preliminary Injunction . . . where in a suit in equity by the owner of a shopping center and one of its tenants it is established that the appellant-union peacefully picketed near tenant's building within the confines of said shopping center; that no picketing efforts were directed toward the shopping center or other tenants; that picketing efforts were merely to inform the public of the labor dispute?"

Supreme Court was involved in *Beck* v. *Washington, supra,* and we held that when a defendant has failed to comply with such a rule "the argument cannot be entertained here under an unbroken line of precedent. *E. g., Ferguson* v. *Georgia,* 365 U. S. 570, 572 (1961); *Capital City Dairy Co.* v. *Ohio,* 183 U. S. 238, 248 (1902)." 369 U. S., at 553–554.[6] I am therefore led to conclude that we have no jurisdiction to consider the question of pre-emption.[7]

Turning to the First Amendment question, I believe that in the circumstances it is not an appropriate one for this Court to decide. This controversy arose in the course of a labor union's efforts to achieve labor goals by informational picketing. Although no pre-emption question is properly before us, I do think that we can take notice that this is an area in which Congress has enacted detailed legislation, see, *e. g.,* 29 U. S. C. § 158 (b)(7)(C), and has set up an administrative agency to resolve such disputes in the first instance. The reason why it was deemed necessary to fashion the doctrine of pre-emption under the federal labor laws was that it would be intolerably disruptive if this statutory scheme were interpreted differently by state and federal courts. See, *e. g., Garner* v. *Teamsters Union,* 346 U. S. 485, 490–491; *San Diego Unions* v. *Garmon,* 359 U. S. 236, 242–245. It seems to me that a similar objection applies to this Court's resolution of such disputes by resort to the

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[6] See also *Wolfe* v. *North Carolina,* 364 U. S. 177, 195; *Parker* v. *Illinois,* 333 U. S. 571; *CIO* v. *McAdory,* 325 U. S. 472, 477.

[7] The petitioners contend that this Court has jurisdiction to consider the pre-emption issue despite the petitioners' failure to raise it below, because the question is one of "subject matter jurisdiction." Although some implied support for this proposition may be found in *Seaboard Air Line R. Co.* v. *Daniel,* 333 U. S. 118, 122–123, I am unable to perceive how the nature of the federal question involved can affect the specific limitation on our jurisdiction contained in 28 U. S. C. § 1257.

Constitution. For the establishment by this Court of a rigid constitutional rule in a field where Congress has attempted to strike a delicate balance between competing economic forces, and in circumstances where we cannot know how the controversy would be settled by Congress' chosen instrument, may also have a considerable disruptive effect. I therefore believe that we should exercise our discretion not to reach the First Amendment issue, and that we should dismiss the writ as improvidently granted. Such a disposition would not be unfair to the petitioners, since the failure to bring the preemption question properly before us was their own.

MR. JUSTICE WHITE, dissenting.

The reason why labor unions may normally picket a place of business is that the picketing occurs on public streets which are available to all members of the public for a variety of purposes that include communication with other members of the public. The employer businessman cannot interfere with the pickets' communication because they have as much right to the sidewalk and street as he does and because the labor laws prevent such interference under various circumstances; the Government may not interfere on his behalf, absent obstruction, violence, or other valid statutory justification, because the First Amendment forbids official abridgment of the right of free speech.

In *Marsh* v. *Alabama,* 326 U. S. 501 (1946), the company town was found to have all of the attributes of a state-created municipality and the company was found effectively to be exercising official power as a delegate of the State. In the context of that case, the streets of the company town were as available and as dedicated to public purposes as the streets of an ordinary town. The company owner stood in the shoes of the State in attempting to prevent the streets from being used as public streets are normally used.

The situation here is starkly different. As MR. JUSTICE BLACK so clearly shows, Logan Valley Plaza is not a town but only a collection of stores. In no sense are any parts of the shopping center dedicated to the public for general purposes or the occupants of the Plaza exercising official powers. The public is invited to the premises but only in order to do business with those who maintain establishments there. The invitation is to shop for the products which are sold. There is no general invitation to use the parking lot, the pickup zone, or the sidewalk except as an adjunct to shopping. No one is invited to use the parking lot as a place to park his car while he goes elsewhere to work. The driveways and lanes for auto traffic are not offered for use as general thoroughfares leading from one public street to another. Those driveways and parking spaces are not public streets and thus available for parades, public meetings, or other activities for which public streets are used. It may be more convenient for cars and trucks to cut through the shopping center to get from one place to another, but surely the Court does not mean to say that the public may use the shopping center property for this purpose. Even if the Plaza has some aspects of "public" property, it is nevertheless true that some public property is available for some uses and not for others; some public property is neither designed nor dedicated for use by pickets or for other communicative activities. *E. g., Adderley* v. *Florida,* 385 U. S. 39 (1966). The point is that whether Logan Valley Plaza is public or private property, it is a place for shopping and not a place for picketing.

The most that can be said is that here the public was invited to shop, that except for their location in the shopping center development the stores would have fronted on public streets and sidewalks, and that the shopping center occupied a large area. But on this

premise the parking lot, sidewalks, and driveways would be available for all those activities which are usually permitted on public streets. It is said that Logan Valley Plaza is substantially equivalent to a business block and must be treated as though each store was bounded by a public street and a public sidewalk. This rationale, which would immunize nonobstructive labor union picketing, would also compel the shopping center to permit picketing on its property for other communicative purposes, whether the subject matter concerned a particular business establishment or not. Nonobstructive handbilling for religious purposes, political campaigning, protests against government policies—the Court would apparently place all of these activities carried out on Logan Valley's property within the protection of the First Amendment, although the activities may have no connection whatsoever with the views of the Plaza's occupants or with the conduct of their businesses.

Furthermore, my Brother BLACK is surely correct in saying that if the invitation to the public is sufficient to permit nonobstructive picketing on the sidewalks, in the pickup zone, or in the parking area, only actual interference with customers or employees should bar pickets from quietly entering the store and marching around with their message on front and back.

It is not clear how the Court might draw a line between "shopping centers" and other business establishments which have sidewalks or parking on their own property. Any store invites the patronage of members of the public interested in its products. I am fearful that the Court's decision today will be a license for pickets to leave the public streets and carry out their activities on private property, as long as they are not obstructive. I do not agree that when the owner of private property invites the public to do business with him he impliedly dedicates his property for other uses as well. I do not think the

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First Amendment, which bars only official interferences with speech, has this reach. In *Marsh,* the company ran an entire town and the State was deemed to have devolved upon the company the task of carrying out municipal functions. But here the "streets" of Logan Valley Plaza are not like public streets; they are not used as thoroughfares for general travel from point to point, for general parking, for meetings, or for Easter parades.

If it were shown that Congress has thought it necessary to permit picketing on private property, either to further the national labor policy under the Commerce Clause or to implement and enforce the First Amendment, we would have quite a different case. But that is not the basis on which the Court proceeds, and I therefore dissent.

Syllabus.

IN RE WHITTINGTON.

CERTIORARI TO THE COURT OF APPEALS OF OHIO, FAIRFIELD COUNTY.

No. 701. Argued April 2, 1968.—Decided May 20, 1968.

Petitioner, 14 years of age, was adjudged a delinquent by an Ohio Juvenile Court on the basis of the trial judge's finding that there was "probable cause" to believe that he had committed second-degree murder, a felony if committed by an adult. He appealed to a state Court of Appeals alleging that the delinquency proceeding violated his Fourteenth Amendment due process rights. The appellate court affirmed the judgment below and the Ohio Supreme Court dismissed a further appeal. After the petition for certiorari was filed here on April 11, 1967, petitioner was bound over for trial as an adult and indicted for first-degree murder. *Held:* Since the Ohio courts have not had the opportunity to assess the impact of *In re Gault*, 387 U. S. 1, decided May 15, 1967, on petitioner's constitutional claims, the judgment is vacated and remanded to the state Court of Appeals for reconsideration in light of *Gault*. Upon remand the court may also consider the impact, if any, on petitioner's questions concerning the intervening Juvenile Court order requiring him to face trial in the adult courts.

13 Ohio App. 2d 11, 233 N. E. 2d 333, vacated and remanded.

Jack Supman and *Daniel A. Rezneck* argued the cause for petitioner. With them on the briefs was *Judson C. Kistler.*

E. Raymond Morehart and *Merritt W. Green* argued the cause for the State of Ohio. On the brief with *Mr. Morehart* was *S. Farrell Jackson.*

Briefs of *amici curiae,* urging reversal, were filed by *Edward Q. Carr, Jr.,* and *Leon B. Polsky* for the Legal Aid Society of New York, and by the Defender's Office, Cleveland Legal Aid Society.

Briefs of *amici curiae* were filed by *Mr. Green* for the National Council of Juvenile Court Judges, and by *George R. Georgieff,* Assistant Attorney General of Florida, for the Florida Council of Juvenile Court Judges.

PER CURIAM.

Petitioner, who was 14 years old at the time, was adjudged a delinquent by the Juvenile Court of Fairfield County, Ohio, on September 7, 1966, on the basis of the trial judge's finding that there was "probable cause" to believe that he had committed a crime that would be a felony if committed by an adult, namely, second-degree murder. Petitioner appealed to the Ohio Court of Appeals for Fairfield County, contending that the proceeding in the Juvenile Court which resulted in the order adjudicating him a delinquent violated his rights under the Due Process Clause of the Fourteenth Amendment. Specifically he argued that he had been determined to be a delinquent on the basis of an unconstitutionally low standard of proof, and that he had been denied his constitutional rights to trial by jury, to an impartial tribunal, and to bail pending disposition of the case against him; he also contended that his privilege against self-incrimination had been violated by the admission into evidence against him of statements made in response to questioning from police officers. The Ohio Court of Appeals rejected these contentions and affirmed the judgment of the Juvenile Court on January 3, 1967. 13 Ohio App. 2d 11, 233 N. E. 2d 333. On March 15, 1967, the Supreme Court of Ohio, *sua sponte*, dismissed petitioner's further appeal on the ground that it presented "no substantial constitutional question." Petitioner then filed a petition for certiorari in this Court, which we granted, 389 U. S. 819 (1967), raising the same issues presented in the Ohio courts.

Under Ohio law an adjudication that a child is a delinquent can have numerous substantial consequences. For example, once such a determination is made the Juvenile Court may place the child in a variety of state institutions or in a foster home. Ohio Rev. Code § 2151.35. Another alternative disposition in a case where the child

has been found to have committed a felony is for the Juvenile Court to bind the child over to the Court of Common Pleas for trial under the criminal statutes applicable to adults. Ohio Rev. Code § 2151.26.* At the time the petition for certiorari was filed in this case on April 11, 1967, no disposition beyond the adjudication itself and ordering of a physical and mental examination of petitioner had been made by the Juvenile Court. We have since been informed by the parties that petitioner has been bound over for trial as an adult and that he has been indicted for the crime of first-degree murder.

The State argues vigorously that, because of the disposition subsequently made by the Juvenile Court, the proceeding at which the determination of delinquency was made was merely the equivalent of a probable cause hearing for an adult. Petitioner, on the other hand, asserts that his adjudication as a delinquent is final for purposes of appellate review and that substantial consequences of that decision continue despite the supervening transfer of jurisdiction over petitioner to the adult criminal courts. The resolution of this dispute is crucial to many of the issues presented by petitioner, since, for example, in ordinary probable cause hearings involving adults there is no right to either trial by jury or a finding of guilt beyond a reasonable doubt. The unresolved question under Ohio law is not whether the adjudication of delinquency is a final, appealable order. The Ohio Court of Appeals considered that issue and ruled that

*In addition, Ohio specifically provides that a delinquency judgment may be considered by any court with respect to sentencing or probation in subsequent criminal proceedings. Ohio Rev. Code § 2151.35. For a general discussion of the practical consequences for juveniles of a delinquency record, see the President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 66–67, 75 (1967), and its Task Force Report: Juvenile Delinquency and Youth Crime 92–93, 360–361, 385, 417–418 (1967).

the order is appealable, and the Ohio Supreme Court necessarily accepted this conclusion because its dismissal of the appeal was not based on the jurisdictional issue. The question which the Ohio courts have not settled is what, if any, effect the "disposition" order, entered after their decisions on the appeal and after the petition for certiorari was filed here, has upon the prior delinquency determination made by the Juvenile Court.

On the constitutional issues, petitioner relies heavily on *In re Gault*, 387 U. S. 1, which was decided on May 15, 1967, some two months after the dismissal by the Ohio Supreme Court in this case. In *Gault*, this Court held squarely, for the first time, that various of the federal constitutional guarantees accompanying ordinary criminal proceedings were applicable to state juvenile court proceedings where possible commitment to a state institution was involved. Because the Ohio courts have not had the opportunity to assess the impact of that decision on petitioner's claims, we deem it appropriate to vacate the judgment of the Ohio Court of Appeals and remand the case for reconsideration in light of *Gault*. Upon such remand, the Ohio court may, of course, also consider the impact, if any, on the questions raised by petitioner of the intervening order of the Juvenile Court requiring him to face trial in the adult courts.

The judgment is vacated and the case is remanded to the Ohio Court of Appeals for Fairfield County for consideration in light of *In re Gault*, 387 U. S. 1 (1967).

Vacated and remanded.

MR. JUSTICE WHITE, with whom MR. JUSTICE BLACK joins, dissenting.

I would dismiss this case because the determination of delinquency which we have before us is not a final judgment within our appellate jurisdiction over proceedings in state courts. 28 U. S. C. § 1257. *Eastman*

v. *Ohio*, 299 U. S. 505 (1936); *Polakow's Realty Experts, Inc.* v. *Alabama*, 319 U. S. 750 (1943); see *Berman* v. *United States*, 302 U. S. 211, 212 (1937); *Edwards* v. *California*, 314 U. S. 160, 171 (1941); R. Stern & E. Gressman, Supreme Court Practice § 3–15 (3d ed. 1962); Robertson & Kirkham's Jurisdiction of the Supreme Court of the United States, § 39 (R. Wolfson & P. Kurland, eds. 1951). The Juvenile Court's formal order found petitioner to be delinquent but made no final disposition of his case; it did not relinquish jurisdiction to the adult court, place petitioner on probation, or commit him to a juvenile institution. Since that time, however, the Juvenile Court has entered an order relinquishing jurisdiction to the adult court. That order is now on appeal in the courts of Ohio, and that order may be a final judgment of the Juvenile Court falling within the reach of our appellate jurisdiction. If that order were properly before us now, it would raise the question of the constitutionality of the procedures employed to determine delinquency where such a determination is a prerequisite (as it may be under Ohio law) to relinquishing jurisdiction to the adult court. I do not believe that turnover proceedings require all of the formalities which should attend a determination of delinquency for purposes of final disposition in the Juvenile Court itself. I also have great doubt that the finding of delinquency in this case, and any consequences which normally attach to it, would in any way survive a trial and a not guilty verdict in the adult courts.

DARWIN *v.* CONNECTICUT.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT.

No. 794, Misc. Decided May 20, 1968.

Petitioner was arrested for murder on December 6, 1963, and held incommunicado by police officers for 30 to 48 hours, during which they sought and finally obtained his confession. Three requests by petitioner to communicate with the outside world, numerous attempts by his lawyers to communicate with him or the officer in charge of him, and the issuance of a writ of habeas corpus by a state court judge were unavailing. The trial judge found that it was "routine procedure" for investigating officers not to be disturbed during an investigation. While thus held, petitioner was subjected by officers to questioning. Although the trial judge excluded from evidence an oral confession given on December 7 after petitioner had "either faint[ed] or pretend[ed] to faint," and a written confession made shortly thereafter, the judge admitted a written confession given the next day, December 8, and evidence as to a partial re-enactment of the crime. During that re-enactment, as he had done intermittently while in custody, petitioner disclaimed guilt. Petitioner was convicted and the State Supreme Court affirmed. *Held:* In view of the "totality of the circumstances" and the absence of any "break in the stream of events" insulating the final events "from the effect of all that went before" (*Clewis* v. *Texas*, 386 U. S. 707, 708, 710), the trial judge erred in holding the December 8 confession and partial re-enactment voluntary.

Certiorari granted; 155 Conn. 124, 230 A. 2d 573, reversed and remanded.

John F. Shea, Jr., for petitioner.

Joel H. Reed II and *Etalo G. Gnutti* for respondent.

PER CURIAM.

Petitioner was convicted of second degree murder and sentenced to life imprisonment. The Connecticut Su-

preme Court affirmed the judgment. 155 Conn. 124, 230 A. 2d 573 (1967). Petitioner seeks a writ of certiorari from this Court. We grant the writ and reverse.

On Friday, December 6, 1963, petitioner was arrested on a coroner's warrant charging him with murder. During that entire day until 9 p. m. petitioner was subjected to questioning. Sometime that evening, the officer in charge brought in a revolving disc and sought to persuade petitioner to look at it and "relax." The trial judge said that "[the officer] was not completely unaware that this was a common hypnotic device." The wheel turned for about half an hour, but petitioner refused to look at it.

The next morning the questioning resumed and continued intermittently until about 4 p. m. when petitioner fell forward, according to the trial judge, "either fainting or pretending to faint." He was revived and then confessed to the murder, as hereinafter described, in response to questioning by the officer in charge.

During the entire period petitioner was in custody, his counsel had been making determined but unsuccessful efforts to contact him or the officer in charge of him. On Friday, December 6, there were 19 phone calls to various police offices, including nine to the one at which petitioner was held. On Saturday, there were five calls, and on Sunday, there was one.

On Friday, there was a personal visit by one of the lawyers to the police barracks in Stafford Springs where petitioner had been taken that morning. But at about the same time that counsel arrived, the officer in charge took petitioner from the barracks and drove him around, apparently to protect him from what the officer thought were newspapermen.[1] Counsel made four visits to various barracks on Saturday.

[1] When initially arrested, petitioner had asked to use the telephone but was not permitted to do so.

Each of these attempts was met with disclaimers of knowledge of the whereabouts of either petitioner or of the officer in charge. The trial judge found that it was "routine procedure" for investigating officers not to be disturbed during an investigation. At about 1 or 1:30 p. m. Saturday, at counsel's request, a superior court judge issued a writ of habeas corpus. A deputy sheriff was instructed to serve the writ upon the officer in charge of petitioner and upon the coroner within half an hour. The sheriff could not locate the officer or the coroner, although the purpose of this inquiry was stated to the communications officer at the Hartford barracks. On Sunday, the sheriff called the Stafford Springs barracks in search of the officer and received a call informing him that the officer would be at the superior court at 2 p. m.[2]

Petitioner's first confession, made orally after the "fainting" incident on the afternoon of Saturday, December 7, the second day of arrest and interrogation, was excluded from evidence by the trial judge. The trial judge also excluded petitioner's written confession made shortly thereafter. The trial judge, however, admitted a subsequent written confession made on Sunday, December 8, and evidence as to a partial re-enactment of the crime which petitioner staged on that day at the request of the police. During the course of this partial re-enactment, petitioner, as he had done intermittently during his custody, denied that he committed the crime. The Connecticut Supreme Court affirmed.

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[2] The trial judge specifically found that the officer in charge knew petitioner was represented by counsel at the coroner's inquest just one day before his arrest, and that the officer called one of petitioner's lawyers on Sunday to inform him that there would be a presentment at 2 p. m. The trial judge also found that the officer did not know whether or not counsel were on a retainer basis or had been engaged only for the inquest.

Since the trial in this case began before the decisions of this Court in *Escobedo* v. *Illinois,* 378 U. S. 478 (1964), and *Miranda* v. *Arizona,* 384 U. S. 436 (1966), these cases are not controlling. *Johnson* v. *New Jersey,* 384 U. S. 719 (1966). But they are relevant on the issue of voluntariness. *Davis* v. *North Carolina,* 384 U. S. 737 (1966). In the present case, petitioner's lawyers made numerous attempts to communicate with petitioner or with the officer in charge. (Cf. *Escobedo* v. *Illinois, supra, Miranda* v. *Arizona, supra,* at 465, n. 35.) A writ of habeas corpus issued by a state judge at the request of petitioner's counsel was fruitless; and petitioner on three separate occasions sought and was denied permission to communicate with the outside world.

The inference is inescapable that the officers kept petitioner incommunicado for the 30 to 48 hours during which they sought and finally obtained his confession. See *Davis* v. *North Carolina, supra,* at 745–746; *Haynes* v. *Washington,* 373 U. S. 503 (1963). Considering the "totality of the circumstances" (see *Clewis* v. *Texas,* 386 U. S. 707 (1967)), we conclude that the court erred in holding that the confession and the partial re-enactment were voluntary. The denial of access to counsel and the outside world continued throughout, and there was "no break in the stream of events" from arrest throughout the concededly invalid confessions of Saturday, December 7, to the confession and re-enactment of Sunday, December 8, "sufficient to insulate" the final events "from the effect of all that went before." *Clewis* v. *Texas, supra,* at 710. See *Beecher* v. *Alabama,* 389 U. S. 35, 36, n. 2 (1967).

Accordingly, the motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment below is reversed and the case

remanded for further proceedings not inconsistent with our decision herein.

MR. JUSTICE WHITE dissents.

MR. JUSTICE HARLAN, concurring in part and dissenting in part.

I am unable to agree with the basis on which the Court reverses petitioner's conviction. The courts of the State of Connecticut conducted a careful and conscientious review of the "totality of the circumstances" surrounding petitioner's three confessions. If the question in this case were simply whether the third confession was coercively extracted, I would vote to affirm. I cannot join the Court in what seems to me no more than a substitution of its view on a close factual question for that of the state courts.

In this case, however, a special element is present. The trial court ruled that the prosecution had not met its burden of proving that petitioner's first two confessions were voluntarily made. It then admitted his third confession. The Connecticut Supreme Court, affirming, evaluated petitioner's third confession by the rules that had been applied to the other two: finding that the atmosphere had changed enough to tip the balance in favor of voluntariness, it found this confession admissible. I do not think this reflected a proper approach to the problem of multiple confessions.

A principal reason why a suspect might make a second or third confession is simply that, having already confessed once or twice, he might think he has little to lose by repetition. If a first confession is not shown to be voluntary, I do not think a later confession that is merely a direct product of the earlier one should be held to be voluntary. It would be neither conducive to good police

work, nor fair to a suspect, to allow the erroneous impression that he has nothing to lose to play the major role in a defendant's decision to speak a second or third time.

In consequence, when the prosecution seeks to use a confession uttered after an earlier one not found to be voluntary, it has, in my view, the burden of proving not only that the later confession was not itself the product of improper threats or promises or coercive conditions, but also that it was not directly produced by the existence of the earlier confession. See *United States* v. *Bayer*, 331 U. S. 532, 540–541. Here, the facts as stated by the state courts fail to satisfy this additional burden. Petitioner's third confession followed the completion of his inadmissible second confession by only a few hours.* In the interval he appears to have talked to no one except his jailors and the coroner. There is no indication that he had any reason to think that a third confession would increase his peril. Since I would hold only that the state courts applied the wrong standard in this case, I would remand for further proceedings, in order to give the prosecution the opportunity to show that the third confession was not merely the product of the erroneous impression that the cat was already out of the bag.

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*This Court indicates that the second confession occurred on Saturday and the third on Sunday. In fact, petitioner completed his signature on the second confession on Sunday morning and immediately thereafter agreed to re-enact the crime. After the re-enactment he dictated the third confession and had signed it by 1:50 Sunday afternoon. Although petitioner exhibited sporadic hesitation, the events of Sunday, as described by the Supreme Court of Connecticut, form a continuous sequence. The Connecticut courts rejected the argument that the Sunday completion of the signature on the Saturday confession was a "voluntary" adoption of that statement.

WILSON *v.* CITY OF PORT LAVACA ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS.

No. 1238. Decided May 20, 1968.

Where the district judge in whose court the case was originally filed adopts as his own a three-judge court's determination that the claim was not "one which must be heard by a three-judge court" and that the relief sought was not warranted, an appeal lies to the Court of Appeals and not to this Court, and therefore the judgment is vacated and remanded to permit entry of a fresh decree from which a timely appeal may be taken to the Court of Appeals.

285 F. Supp. 85, vacated and remanded.

Willett Wilson, appellant, *pro se.*

PER CURIAM.

A three-judge federal court, convened pursuant to 28 U. S. C. § 2281, determined that plaintiff's claim was not "one which must be heard by a three-judge court." 285 F. Supp. 85, 87. It also ruled that the relief sought by plaintiff was not warranted. The district judge in whose court the case was originally filed adopted the action of the court as his own. The resulting situation is similar, we think, to that which results when a single judge declines to convene a three-judge court and denies relief: an appeal lies to the appropriate United States Court of Appeals, and not to this Court. *Schackman* v. *Arnebergh,* 387 U. S. 427. It does not appear from the record that a protective appeal was lodged in the Court of Appeals, and the time to do so may have expired. Therefore, we vacate the judgment below and remand the case to the District Court so that it may enter a fresh decree from which a timely appeal may be taken to the Court of Appeals. *Utility Comm'n* v. *Pennsylvania R. Co.,* 382 U. S. 281, 282.

It is so ordered.

ZWICKER ET AL. *v.* BOLL, DISTRICT ATTORNEY OF DANE COUNTY ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN.

No. 573, Misc. Decided May 20, 1968.

270 F. Supp. 131, affirmed.

Melvyn Zarr, William M. Kunstler, and *Anthony G. Amsterdam* for appellants.

Bronson C. La Follette, Attorney General of Wisconsin, and *William A. Platz, Thomas A. Lockyear,* and *Charles A. Bleck,* Assistant Attorneys General, for appellees.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* is granted. The motion to affirm is also granted and the judgment is affirmed. *Cameron* v. *Johnson,* 390 U. S. 611.

MR. JUSTICE DOUGLAS, dissenting.

Appellants are graduate and undergraduate students at the University of Wisconsin and are active in student political and civil rights organizations. They brought an action in the District Court for the Western District of Wisconsin, seeking a declaratory judgment that the Wisconsin disorderly conduct statute [1] is overbroad and therefore unconstitutional on its face, or an injunction re-

[1] Wis. Stat. § 947.01 reads in pertinent part:

"947.01. Disorderly conduct. Whoever does any of the following may be fined not more than $100 or imprisoned not more than 30 days: (1) In a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud, or otherwise disorderly conduct under circumstances in which such conduct tends to cause or provoke a disturbance . . . ."

straining state criminal prosecutions under that statute which were pending against them.

Appellants alleged in their complaint that preceding their arrests they were engaged only in peaceful and constitutionally protected protest activities. Appellants were protesting against American policy in Vietnam. The arrests were made in various buildings of the University of Wisconsin in which appellants and others had gathered to object to a chemical manufacturer of napalm being permitted to conduct employment interviews in the buildings. Appellants were arrested under a "disorderly conduct" statute. We know that such statutes historically have been used in reprisal against unpopular groups or persons who espouse unpopular causes. Cf. *Brown* v. *Louisiana*, 383 U. S. 131; *Cox* v. *Louisiana*, 379 U. S. 536; *Taylor* v. *Louisiana*, 370 U. S. 154; *Garner* v. *Louisiana*, 368 U. S. 157. But that is a practice no longer permissible now that the First Amendment is applicable to the States by reason of the Fourteenth.

A three-judge court was convened which dismissed the complaint after oral argument but without conducting an evidentiary hearing. Judge Fairchild, concurring, believed that 28 U. S. C. § 2283 [2] prohibited the issuance of an injunction; Judge Doyle, dissenting, was of the contrary opinion. Judge Gordon found it unnecessary to reach that question, deciding rather to abstain in favor of the state criminal proceedings.

In addition to attacking the statute as void on its face for overbreadth, appellants alleged that their arrests were made and prosecutions instituted for purposes of harassment and in a discriminatory manner on account of their

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[2] 28 U. S. C. § 2283 provides:

"A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

political beliefs.[3] Appellees in their answer denied these allegations and attached copies of the complaints filed in the state criminal proceedings which alleged that appellants were interfering with classes or interviews in the

[3] Paragraphs 12 and 13 of appellants' complaint alleged:

"Plaintiffs allege that their arrest under this Statute is basically for the unlawful purpose of depriving them of their rights of freedom of speech, assembly, association, and petitioning their Government for a redress of grievances guaranteed by the First and Fourteenth Amendments to the United States Constitution, and 42 U. S. C. § 1983. Further enforcement of Section 947.01, Wisconsin Statutes, the Disorderly Conduct Statute, will have the effect of punishing those plaintiffs now being prosecuted for the exercise of rights, privileges and immunities secured to them by the Constitution and laws of the United States; has [*sic*] and will deter plaintiffs and others similarly situated from the future exercise of these rights, privileges and immunities; has encouraged and will encourage defendants and other State, County or local officials, acting under color of law, to engage in further acts of intimidation, harassment, threats and other actions meant to prevent and deter plaintiffs and others similarly situated from the exercise of these rights, privileges, and immunities.

. . . . . .

"Plaintiffs allege that their arrests and prosecutions have been and are being carried on with the basic purpose and effects of intimidating and harassing them and punishing them for and deterring them from, exercise of their constitutionally protected rights of free speech and assembly and association to:

"1. Oppose and protest the policies of the United States Government, the State of Wisconsin, and the University of Wisconsin in supporting and contributing to the war effort in Vietnam;

"2. Oppose and protest the foreign policy of the United States;

"3. Or otherwise publicly express unpopular and unorthodox views on public issues of vital concern.

"This intimidation and harassment of plaintiffs is pursuant to a policy of political discrimination which is encouraged, followed and enforced by legislation including the Disorderly Conduct Statute, Section 947.01 of the Wisconsin Statutes, and by action of the executive or judicial branches of the State of Wisconsin. The Disorderly Conduct Statute, 947.01, Wisconsin Statutes, is unconstitutional on its face and as applied. It permits and encourages Wisconsin executive or judicial officials to discriminate against plaintiffs and others

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buildings by speaking in loud voices or by refusing to leave when requested to do so.

We stated in *Dombrowski* v. *Pfister*, 380 U. S. 479, 489–490, that the abstention doctrine is inappropriate for cases in which state statutes are justifiably challenged either on their face or "as applied for the purpose of discouraging protected activities." In my view, appellants have adequately alleged in their complaint that their arrests and prosecutions were effected in bad faith and in a discriminatory manner in order to punish and discourage exercise of constitutionally protected rights. Since an issue of fact is presented, I would remand to the court below with directions to conduct a plenary hearing on the point.[4]

Appellants have alleged in their complaint facts surrounding their arrests which suggest harassment solely on account of the nature of appellants' protest.[5] More-

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similarly situated by reason of political beliefs and ideas, and to intimidate and harass by arrest, detention, brutality, excessive bail and prosecution or the threat thereof, plaintiffs or all who exercise their rights of free speech, assembly, association and petitioning their Government for redress of grievances to express unpopular or unorthodox views on public issues of vital concern or to protest and oppose certain policies of the United States, the State of Wisconsin or the University of Wisconsin on vital public issues, contrary to the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States."

[4] Whether § 2283 constitutes a bar to issuance of an injunction is a question the Court has refrained from deciding in circumstances where it appears that an injunction might be improper on other grounds. See *Cameron* v. *Johnson*, 390 U. S. 611, 613, n. 3 (majority opinion), 628, n. 5 (dissenting opinion).

[5] The complaint alleges that appellant Cohen attempted to enter the university's Commerce Building carrying signs protesting the use of napalm in Vietnam and the university's policy permitting a chemical manufacturer of napalm to conduct employment interviews in the building. Cohen, who was alone, was stopped just inside the door by police officers and told he could not enter the building with signs. He attempted to enter with the signs and

over, the criminal complaints filed against several of the appellants in the state court, and appended to the appellees' answer in this case, raise a strong suspicion that the arrests and prosecutions were carried out in bad faith.[6]

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was grabbed by an officer and pushed away. Appellee Hansen (chief of the university's department of protection and security) was summoned. He allegedly grabbed Cohen's signs and threw them out the door into the snow. When Cohen asked why he did that, Hansen allegedly replied, "Because you make me nervous all the time, you make me nervous." Hansen then allegedly jostled Cohen and stated, "I don't like you." Cohen and Hansen then moved to a point in the building where some other students, including appellant Zwicker, were conducting a discussion. Cohen told the group that his signs had been destroyed; other signs appeared and one was handed to Cohen. Hansen allegedly began yelling that people could not talk in the building and could not have signs, and then began tearing up the signs. Some jostling and shoving apparently ensued as police allegedly attempted to grab the signs. Another university official then told Cohen to leave the building. When Cohen asked what regulation of the university he had broken, the official allegedly replied, "I don't know, but the looks of you is enough." Cohen was then arrested and taken from the building.

[6] These documents suggest that the arrests may have been made because the appellants were a nuisance to the university rather than because of "disorderly conduct under circumstances in which such conduct tends to cause or provoke a disturbance." Wis. Stat. § 947.01 (1).

For example, while the complaint against appellant Webb formally charges disorderliness and tendency to cause a disturbance, nothing in the complaint's statement of "essential facts" supports the charge. The complaint alleges that Webb "was engaged in a protest demonstration in the Chemical Engineering Building on the University of Wisconsin Madison Campus. Defendant was sitting in an interview room interfering with interviews which were being conducted for students of the University for prospective employment. Defendant was asked to leave several times and refused." Other complaints alleged similar facts; still others alleged that certain appellants spoke in loud voices and thereby disrupted classes, language which might come within the scope of § 947.01 (1) ("unreasonably loud . . . conduct [tending] to cause or provoke a disturbance"). But if appellants can demonstrate at an evidentiary hearing that, as they

Where there are allegations of bad faith, harassment, and discrimination, critical evidence on the matter can only be drawn out upon cross-examination of the officials involved. The question is not the guilt or innocence of the persons charged, but whether their arrests were made and prosecutions commenced in bad faith, for purposes of harassment and in a discriminatory manner. See *Cameron* v. *Johnson*, 390 U. S. 611, 619–620, 621. If the charge that the statute was used in bad faith were shown, a federal claim would be established.[7] And it would not matter what the state courts later did, for the interim "continuing harassment" of appellants for exercising their First Amendment rights would entitle them to relief. See *Dombrowski* v. *Pfister*, 380 U. S., at 490.

For these reasons I would note probable jurisdiction, vacate the judgment below, and remand the case for a preliminary hearing on the issue of the use of a disorderly conduct statute to punish people for expression of their unpopular views.

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allege, the statute has been purposefully or intentionally enforced against them in a discriminatory manner to suppress the ideas which they espouse, appellants could not constitutionally be convicted. See *Snowden* v. *Hughes*, 321 U. S. 1; Note, Discriminatory Law Enforcement and Equal Protection *From* the Law, 59 Yale L. J. 354 (1950). Cf. *Brown* v. *Louisiana*, 383 U. S. 131, 141–142. And see *People* v. *Darcy*, 59 Cal. App. 2d 342, 360, 139 P. 2d 118, 129 (Cal. Dist. Ct. App. 1943) (dissenting opinion). ("It is much better for society that an accused should go free, than for our criminal processes to be polluted by prosecutions founded on prejudice against and hatred for the political beliefs of the accused.")

[7] 42 U. S. C. § 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

SEFERI ET AL. *v.* IVES, STATE HIGHWAY COMMISSIONER.

APPEAL FROM THE SUPREME COURT OF CONNECTICUT.

No. 1241. Decided May 20, 1968.

155 Conn. 580, 236 A. 2d 83, appeal dismissed.

Albert L. Coles for appellants.

Robert K. Killian, Attorney General of Connecticut, and *Jack Rubin* and *Clement J. Kichuk,* Assistant Attorneys General, for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

NORTH AMERICAN VAN LINES, INC. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA.

No. 1295. Decided May 20, 1968.

277 F. Supp. 741, affirmed.

Martin A. Weissert for appellant.

Solicitor General Griswold, Assistant Attorney General Turner, Robert W. Ginnane, and *Betty Jo Christian* for the United States et al., and *Alan F. Wohlstetter* for Smyth Overseas Van Lines, Inc., et al., appellees.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

GOLDBLATT *v.* CITY OF DALLAS.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS.

No. 1317. Decided May 20, 1968.

279 F. Supp. 106, appeal dismissed.

Joseph A. Devany for appellant.

N. Alex Bickley, Ted P. MacMaster, and *H. P. Kucera* for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction.

HOWARD *v.* OHIO.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 1217, Misc. Decided May 20, 1968.

Appeal dismissed and certiorari denied.

Neil K. Evans for appellant.

John T. Corrigan for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted.

BROOKS ET AL. *v.* BRILEY, MAYOR OF NASHVILLE, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE.

No. 1285, Misc. Decided May 20, 1968.

274 F. Supp. 538, affirmed.

William M. Kunstler, Arthur Kinoy, Howard Moore, Jr., and *Morton Stavis* for appellants.

George F. McCanless, Attorney General of Tennessee, *Thomas E. Fox,* Assistant Attorney General, *Edwin F. Hunt,* and *Robert E. Kendrick* for appellees.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* is granted. The motion to affirm is also granted and the judgment is affirmed. *Cameron* v. *Johnson,* 390 U. S. 611.

MR. JUSTICE DOUGLAS dissents.

JACKSON *v.* NELSON, WARDEN.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 1446, Misc. Decided May 20, 1968.

Appeal dismissed and certiorari denied.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

WALKER *v.* CALIFORNIA.

APPEAL FROM THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN FRANCISCO.

No. 1392, Misc. Decided May 20, 1968.

Appeal dismissed and certiorari denied.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

THE CHIEF JUSTICE took no part in the consideration or decision of this case.

RUBECK *v.* NEW YORK.

APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, FOURTH JUDICIAL DEPARTMENT.

No. 1536, Misc. Decided May 20, 1968.

Appeal dismissed and certiorari denied.

Bruce K. Carpenter for appellant.

Michael F. Dillon for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

FEDERAL POWER COMMISSION *v.* PAN AMERICAN PETROLEUM CORP. ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 227. Decided May 20, 1968.*

Certiorari granted; 376 F. 2d 161, vacated and remanded.

Solicitor General Marshall, Richard A. Solomon, Peter H. Schiff, and *Joel Yohalem* for petitioner in No. 227. *Bertram D. Moll* and *Morton L. Simons* for Long Island Lighting Co., *Samuel Graff Miller* for Philadelphia Electric Co., and *Kent H. Brown* for Public Service Commission of the State of New York, petitioners in No. 415.

J. P. Hammond, William J. Grove, Carroll L. Gilliam, and *Philip R. Ehrenkranz* for Pan American Petroleum Corp., *Cecil N. Cook* and *Neal Powers, Jr.,* for Cockrell et al., *Cecil E. Munn* for General American Oil Co. of Texas, *Bruce R. Merrill* and *Thomas H. Burton* for Continental Oil Co., *H. H. Hillyer, Jr.,* for J. Ray McDermott & Co., Inc., *Oliver L. Stone* and *Thomas G. Johnson* for Shell Oil Co., *Murray Christian* and *H. W. Varner* for Superior Oil Co., and *Paul W. Hicks, Robert W. Henderson,* and *Donald K. Young* for Placid Oil Co. et al., respondents in both cases.

PER CURIAM.

The petitions for writs of certiorari are granted and the judgments are vacated. The cases are remanded to the United States Court of Appeals for the Tenth

*Together with No. 415, *Long Island Lighting Co. et al.* v. *Pan American Petroleum Corp. et al.,* also on petition for writ of certiorari to the same court.

Circuit for further consideration in light of *Federal Power Commission* v. *Sunray DX Oil Co.*, *ante*, p. 9.

MR. JUSTICE MARSHALL took no part in the consideration or decision of these cases.

BRANIGIN ET AL. *v.* DUDDLESTON ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA.

No. 1252. Decided May 20, 1968.*

284 F. Supp. 176, affirmed.

John J. Dillon, Attorney General of Indiana, and *Charles S. White* for appellants in No. 1252. *Marshall F. Kizer* for appellant in No. 1263.

Leslie Duvall and *William H. Sparrenberger* for appellees in both cases.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

MR. JUSTICE HARLAN, for reasons contained in his memorandum of March 4, 1968 (390 U. S. 932, *sub nom. Branigin* v. *Grills*), in which he acquiesced in the denial of stays of enforcement of the District Court's judgment, also acquiesces in the Court's affirmance of that judgment.

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*Together with No. 1263, *Summers* v. *Duddleston et al.*, also on appeal from the same court.

CALIFORNIA ET AL. *v.* PHILLIPS PETROLEUM CO. ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 373. Decided May 20, 1968.*

Certiorari granted; 377 F. 2d 278, vacated and remanded.

Mary Moran Pajalich and *J. Calvin Simpson* for petitioners in No. 373. *Frederick T. Searls* and *Malcolm H. Furbush* for Pacific Gas & Electric Co., *C. Hayden Ames* for San Diego Gas & Electric Co., and *John Ormasa* for Southern California Gas Co. et al., petitioners in No. 380. *Solicitor General Marshall* and *Richard A. Solomon* for petitioner in No. 385.

Tom P. Hamill, R. D. Haworth, James L. Armour, William H. Tabb, and *Carroll L. Gilliam* for respondent Mobil Oil Corp. in all three cases.

PER CURIAM.

The petitions for writs of certiorari are granted and the judgments are vacated. The cases are remanded to the United States Court of Appeals for the Tenth Circuit for further consideration in light of the *Permian Basin Area Rate Cases,* 390 U. S. 747.

MR. JUSTICE DOUGLAS dissents.

MR. JUSTICE MARSHALL took no part in the consideration or decision of these cases.

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*Together with No. 380, *Pacific Gas & Electric Co. et al.* v. *Phillips Petroleum Co. et al.,* and No. 385, *Federal Power Commission* v. *Phillips Petroleum Co. et al.,* also on petitions for writs of certiorari to the same court.

BROOKLYN UNION GAS CO. ET AL. *v.* STANDARD OIL CO. OF TEXAS ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 503. Decided May 20, 1968.

Certiorari granted; 376 F. 2d 578, reversed.

Edwin F. Russell and *Barbara M. Suchow* for Brooklyn Union Gas Co., *Bertram D. Moll* and *Morton L. Simons* for Long Island Lighting Co., and *Kent H. Brown* for Public Service Commission of the State of New York, petitioners.

Martin N. Erck and *Frank S. Troidl* for respondent Humble Oil & Refining Co.; *Thomas G. Crouch, Robert W. Henderson,* and *Donald K. Young* for respondent Hunt; *Sherman S. Poland* for respondent Coates; *Robert V. Smith* for respondent Patchin-Wilmoth Industries, Inc.; *J. Evans Attwell* and *W. H. Drushel, Jr.,* for respondent Clark Fuel Producing Co.; *William K. Tell, Jr., William R. Slye,* and *James D. Annett* for respondent Texaco Inc.; *Phillip D. Endom, Robert E. May,* and *Francis H. Caskin* for respondent Sun Oil Co.; *Homer E. McEwen, Jr.,* for respondent Sunray DX Oil Co.; *Richard F. Remmers* for respondent Sohio Petroleum Co.; and *Kiel Boone* for respondent Cox.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment is reversed. *Federal Power Commission* v. *Sunray DX Oil Co., ante,* p. 9.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

UNITED STATES *v.* O'BRIEN.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 232. Argued January 24, 1968.—Decided May 27, 1968.*

O'Brien burned his Selective Service registration certificate before a sizable crowd in order to influence others to adopt his antiwar beliefs. He was indicted, tried, and convicted for violating 50 U. S. C. App. § 462 (b), a part of the Universal Military Training and Service Act, subdivision (3) of which applies to any person "who forges, alters, *knowingly destroys, knowingly mutilates,* or in any manner changes any such certificate . . . ," the words italicized herein having been added by amendment in 1965. The District Court rejected O'Brien's argument that the amendment was unconstitutional because it was enacted to abridge free speech and served no legitimate legislative purpose. The Court of Appeals held the 1965 Amendment unconstitutional under the First Amendment as singling out for special treatment persons engaged in protests, on the ground that conduct under the 1965 Amendment was already punishable since a Selective Service System regulation required registrants to keep their registration certificates in their "personal possession at all times," 32 CFR § 1617.1, and wilful violation of regulations promulgated under the Act was made criminal by 50 U. S. C. App. § 462 (b)(6). The court, however, upheld O'Brien's conviction under § 462 (b)(6), which in its view made violation of the nonpossession regulation a lesser included offense of the crime defined by the 1965 Amendment. *Held:*

1. The 1965 Amendment to 50 U. S. C. App. § 462 (b)(3) is constitutional as applied in this case. Pp. 375, 376–382.

(a) The 1965 Amendment plainly does not abridge free speech on its face. P. 375.

(b) When "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. P. 376.

(c) A governmental regulation is sufficiently justified if it is within the constitutional power of the Government and furthers

*Together with No. 233, *O'Brien* v. *United States,* also on certiorari to the same court.

an important or substantial governmental interest unrelated to the suppression of free expression, and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to that interest. The 1965 Amendment meets all these requirements. P. 377.

(d) The 1965 Amendment came within Congress' "broad and sweeping" power to raise and support armies and make all laws necessary to that end. P. 377.

(e) The registration certificate serves purposes in addition to initial notification, *e. g.*, it proves that the described individual has registered for the draft; facilitates communication between registrants and local boards; and provides a reminder that the registrant must notify his local board of changes in address or status. The regulatory scheme involving the certificates includes clearly valid prohibitions against alteration, forgery, or similar deceptive misuse. Pp. 378–380.

(f) The pre-existence of the nonpossession regulation does not negate Congress' clear interest in providing alternative statutory avenues of prosecution to assure its interest in preventing destruction of the Selective Service certificates. P. 380.

(g) The governmental interests protected by the 1965 Amendment and the nonpossession regulation, though overlapping, are not identical. Pp. 380–381.

(h) The 1965 Amendment is a narrow and precisely drawn provision which specifically protects the Government's substantial interest in an efficient and easily administered system for raising armies. Pp. 381–382.

(i) O'Brien was convicted only for the wilful frustration of that governmental interest. The noncommunicative impact of his conduct for which he was convicted makes his case readily distinguishable from *Stromberg* v. *California*, 283 U. S. 359 (1931). P. 382.

2. The 1965 Amendment is constitutional as enacted. Pp. 382–385.

(a) Congress' purpose in enacting the law affords no basis for declaring an otherwise constitutional statute invalid. *McCray* v. *United States*, 195 U. S. 27 (1904). Pp. 383–384.

(b) *Grosjean* v. *American Press Co.*, 297 U. S. 233 (1936) and *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960), distinguished. Pp. 384–385.

376 F. 2d 538, vacated; judgment and sentence of District Court reinstated.

Solicitor General Griswold argued the cause for the United States. With him on the brief were *Assistant Attorney General Vinson, Francis X. Beytagh, Jr., Beatrice Rosenberg,* and *Jerome M. Feit.*

Marvin M. Karpatkin argued the cause for respondent in No. 232 and petitioner in No. 233. With him on the brief were *Howard S. Whiteside, Melvin L. Wulf,* and *Rhoda H. Karpatkin.*

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

On the morning of March 31, 1966, David Paul O'Brien and three companions burned their Selective Service registration certificates on the steps of the South Boston Courthouse. A sizable crowd, including several agents of the Federal Bureau of Investigation, witnessed the event.[1] Immediately after the burning, members of the crowd began attacking O'Brien and his companions. An FBI agent ushered O'Brien to safety inside the courthouse. After he was advised of his right to counsel and to silence, O'Brien stated to FBI agents that he had burned his registration certificate because of his beliefs, knowing that he was violating federal law. He produced the charred remains of the certificate, which, with his consent, were photographed.

For this act, O'Brien was indicted, tried, convicted, and sentenced in the United States District Court for the District of Massachusetts.[2] He did not contest the fact

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[1] At the time of the burning, the agents knew only that O'Brien and his three companions had burned small white cards. They later discovered that the card O'Brien burned was his registration certificate, and the undisputed assumption is that the same is true of his companions.

[2] He was sentenced under the Youth Corrections Act, 18 U. S. C. § 5010 (b), to the custody of the Attorney General for a maximum period of six years for supervision and treatment.

that he had burned the certificate. He stated in argument to the jury that he burned the certificate publicly to influence others to adopt his antiwar beliefs, as he put it, "so that other people would reevaluate their positions with Selective Service, with the armed forces, and reevaluate their place in the culture of today, to hopefully consider my position."

The indictment upon which he was tried charged that he "willfully and knowingly did mutilate, destroy, and change by burning . . . [his] Registration Certificate (Selective Service System Form No. 2); in violation of Title 50, App., United States Code, Section 462 (b)." Section 462 (b) is part of the Universal Military Training and Service Act of 1948. Section 462 (b)(3), one of six numbered subdivisions of § 462 (b), was amended by Congress in 1965, 79 Stat. 586 (adding the words italicized below), so that at the time O'Brien burned his certificate an offense was commited by any person,

> "who forges, alters, *knowingly destroys, knowingly mutilates,* or in any manner changes any such certificate . . . ." (Italics supplied.)

In the District Court, O'Brien argued that the 1965 Amendment prohibiting the knowing destruction or mutilation of certificates was unconstitutional because it was enacted to abridge free speech, and because it served no legitimate legislative purpose.[3] The District Court rejected these arguments, holding that the statute on its face did not abridge First Amendment rights, that the court was not competent to inquire into the motives of Congress in enacting the 1965 Amendment, and that the

[3] The issue of the constitutionality of the 1965 Amendment was raised by counsel representing O'Brien in a pretrial motion to dismiss the indictment. At trial and upon sentencing, O'Brien chose to represent himself. He was represented by counsel on his appeal to the Court of Appeals.

Amendment was a reasonable exercise of the power of Congress to raise armies.

On appeal, the Court of Appeals for the First Circuit held the 1965 Amendment unconstitutional as a law abridging freedom of speech.[4] At the time the Amendment was enacted, a regulation of the Selective Service System required registrants to keep their registration certificates in their "personal possession at all times." 32 CFR § 1617.1 (1962).[5] Wilful violations of regulations promulgated pursuant to the Universal Military Training and Service Act were made criminal by statute. 50 U. S. C. App. § 462 (b)(6). The Court of Appeals, therefore, was of the opinion that conduct punishable under the 1965 Amendment was already punishable under the nonpossession regulation, and consequently that the Amendment served no valid purpose; further, that in light of the prior regulation, the Amendment must have been "directed at public as distinguished from private destruction." On this basis, the court concluded that the 1965 Amendment ran afoul of the First Amendment by singling out persons engaged in protests for special treatment. The court ruled, however, that O'Brien's conviction should be affirmed under the statutory provision, 50 U. S. C. App. § 462 (b)(6), which in its view made violation of the nonpossession regulation a crime, because it regarded such violation to be a lesser included offense of the crime defined by the 1965 Amendment.[6]

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[4] *O'Brien* v. *United States*, 376 F. 2d 538 (C. A. 1st Cir. 1967).

[5] The portion of 32 CFR relevant to the instant case was revised as of January 1, 1967. Citations in this opinion are to the 1962 edition which was in effect when O'Brien committed the crime, and when Congress enacted the 1965 Amendment.

[6] The Court of Appeals nevertheless remanded the case to the District Court to vacate the sentence and resentence O'Brien. In

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The Government petitioned for certiorari in No. 232, arguing that the Court of Appeals erred in holding the statute unconstitutional, and that its decision conflicted with decisions by the Courts of Appeals for the Second [7] and Eighth Circuits [8] upholding the 1965 Amendment against identical constitutional challenges. O'Brien cross-petitioned for certiorari in No. 233, arguing that the Court of Appeals erred in sustaining his conviction on the basis of a crime of which he was neither charged nor tried. We granted the Government's petition to resolve the conflict in the circuits, and we also granted O'Brien's cross-petition. We hold that the 1965 Amendment is constitutional both as enacted and as applied. We therefore vacate the judgment of the Court of Appeals and reinstate the judgment and sentence of the District Court without reaching the issue raised by O'Brien in No. 233.

I.

When a male reaches the age of 18, he is required by the Universal Military Training and Service Act to register with a local draft board.[9] He is assigned a Selective Service number,[10] and within five days he is issued a

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the court's view, the district judge might have considered the violation of the 1965 Amendment as an aggravating circumstance in imposing sentence. The Court of Appeals subsequently denied O'Brien's petition for a rehearing, in which he argued that he had not been charged, tried, or convicted for nonpossession, and that nonpossession was not a lesser included offense of mutilation or destruction. *O'Brien* v. *United States*, 376 F. 2d 538, 542 (C. A. 1st Cir. 1967).

[7] *United States* v. *Miller*, 367 F. 2d 72 (C. A. 2d Cir. 1966), cert. denied, 386 U. S. 911 (1967).

[8] *Smith* v. *United States*, 368 F. 2d 529 (C. A. 8th Cir. 1966).

[9] See 62 Stat. 605, as amended, 65 Stat. 76, 50 U. S. C. App. § 453; 32 CFR § 1613.1 (1962).

[10] 32 CFR § 1621.2 (1962).

registration certificate (SSS Form No. 2).[11] Subsequently, and based on a questionnaire completed by the registrant,[12] he is assigned a classification denoting his eligibility for induction,[13] and "[a]s soon as practicable" thereafter he is issued a Notice of Classification (SSS Form No. 110).[14] This initial classification is not necessarily permanent,[15] and if in the interim before induction the registrant's status changes in some relevant way, he may be reclassified.[16] After such a reclassification, the local board "as soon as practicable" issues to the registrant a new Notice of Classification.[17]

Both the registration and classification certificates are small white cards, approximately 2 by 3 inches. The registration certificate specifies the name of the registrant, the date of registration, and the number and address of the local board with which he is registered. Also inscribed upon it are the date and place of the registrant's birth, his residence at registration, his physical description, his signature, and his Selective Service number. The Selective Service number itself indicates his State of registration, his local board, his year of birth, and his chronological position in the local board's classification record.[18]

The classification certificate shows the registrant's name, Selective Service number, signature, and eligibility classification. It specifies whether he was so classified by his local board, an appeal board, or the President. It

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[11] 32 CFR § 1613.43a (1962).
[12] 32 CFR §§ 1621.9, 1623.1 (1962).
[13] 32 CFR §§ 1623.1, 1623.2 (1962).
[14] 32 CFR § 1623.4 (1962).
[15] 32 CFR § 1625.1 (1962).
[16] 32 CFR §§ 1625.1, 1625.2, 1625.3, 1625.4, and 1625.11 (1962).
[17] 32 CFR § 1625.12 (1962).
[18] 32 CFR § 1621.2 (1962).

contains the address of his local board and the date the certificate was mailed.

Both the registration and classification certificates bear notices that the registrant must notify his local board in writing of every change in address, physical condition, and occupational, marital, family, dependency, and military status, and of any other fact which might change his classification. Both also contain a notice that the registrant's Selective Service number should appear on all communications to his local board.

Congress demonstrated its concern that certificates issued by the Selective Service System might be abused well before the 1965 Amendment here challenged. The 1948 Act, 62 Stat. 604, itself prohibited many different abuses involving "any registration certificate, . . . or any other certificate issued pursuant to or prescribed by the provisions of this title, or rules or regulations promulgated hereunder . . . ." 62 Stat. 622. Under §§ 12 (b)(1)–(5) of the 1948 Act, it was unlawful (1) to transfer a certificate to aid a person in making false identification; (2) to possess a certificate not duly issued with the intent of using it for false identification; (3) to forge, alter, "or in any manner" change a certificate or any notation validly inscribed thereon; (4) to photograph or make an imitation of a certificate for the purpose of false identification; and (5) to possess a counterfeited or altered certificate. 62 Stat. 622. In addition, as previously mentioned, regulations of the Selective Service System required registrants to keep both their registration and classification certificates in their personal possession at all times. 32 CFR § 1617.1 (1962) (Registration Certificates);[19] 32 CFR § 1623.5

[19] 32 CFR § 1617.1 (1962), provides, in relevant part:

"Every person required to present himself for and submit to registration must, after he is registered, have in his personal possession at all times his Registration Certificate (SSS Form No. 2)

(1962) (Classification Certificates).[20] And § 12 (b)(6) of the Act, 62 Stat. 622, made knowing violation of any provision of the Act or rules and regulations promulgated pursuant thereto a felony.

By the 1965 Amendment, Congress added to § 12 (b)(3) of the 1948 Act the provision here at issue, subjecting to criminal liability not only one who "forges, alters, or in any manner changes" but also one who "knowingly destroys, [or] knowingly mutilates" a certificate. We note at the outset that the 1965 Amendment plainly does not abridge free speech on its face, and we do not understand O'Brien to argue otherwise. Amended § 12 (b)(3) on its face deals with conduct having no connection with speech. It prohibits the knowing destruction of certificates issued by the Selective Service System, and there is nothing necessarily expressive about such conduct. The Amendment does not distinguish between public and private destruction, and it does not punish only destruction engaged in for the purpose of expressing views. Compare *Stromberg* v. *California,* 283 U. S. 359 (1931).[21] A law prohibiting destruction of Selective Service certificates no more abridges free speech on its face than a motor vehicle law prohibiting the destruction of drivers' licenses, or a tax law prohibiting the destruction of books and records.

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prepared by his local board which has not been altered and on which no notation duly and validly inscribed thereon has been changed in any manner after its preparation by the local board. The failure of any person to have his Registration Certificate (SSS Form No. 2) in his personal possession shall be prima facie evidence of his failure to register."

[20] 32 CFR § 1623.5 (1962), provides, in relevant part:

"Every person who has been classified by a local board must have in his personal possession at all times, in addition to his Registration Certificate (SSS Form No. 2), a valid Notice of Classification (SSS Form No. 110) issued to him showing his current classification."

[21] See text, *infra,* at 382.

O'Brien nonetheless argues that the 1965 Amendment is unconstitutional in its application to him, and is unconstitutional as enacted because what he calls the "purpose" of Congress was "to suppress freedom of speech." We consider these arguments separately.

II.

O'Brien first argues that the 1965 Amendment is unconstitutional as applied to him because his act of burning his registration certificate was protected "symbolic speech" within the First Amendment. His argument is that the freedom of expression which the First Amendment guarantees includes all modes of "communication of ideas by conduct," and that his conduct is within this definition because he did it in "demonstration against the war and against the draft."

We cannot accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea. However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling;[22] substantial;[23] subordi-

[22] *NAACP* v. *Button*, 371 U. S. 415, 438 (1963); see also *Sherbert* v. *Verner*, 374 U. S. 398, 403 (1963).

[23] *NAACP* v. *Button*, 371 U. S. 415, 444 (1963); *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 464 (1958).

nating;[24] paramount;[25] cogent;[26] strong.[27] Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. We find that the 1965 Amendment to § 12 (b)(3) of the Universal Military Training and Service Act meets all of these requirements, and consequently that O'Brien can be constitutionally convicted for violating it.

The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping. *Lichter* v. *United States,* 334 U. S. 742, 755–758 (1948); *Selective Draft Law Cases,* 245 U. S. 366 (1918); see also *Ex parte Quirin,* 317 U. S. 1, 25–26 (1942). The power of Congress to classify and conscript manpower for military service is "beyond question." *Lichter* v. *United States, supra,* at 756; *Selective Draft Law Cases, supra.* Pursuant to this power, Congress may establish a system of registration for individuals liable for training and service, and may require such individuals within reason to cooperate in the registration system. The issuance of certificates indicating the registration and eligibility classification of individuals is a legitimate and substantial administrative aid in the functioning of this system. And legislation

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[24] *Bates* v. *Little Rock,* 361 U. S. 516, 524 (1960).

[25] *Thomas* v. *Collins,* 323 U. S. 516, 530 (1945); see also *Sherbert* v. *Verner,* 374 U. S. 398, 406 (1963).

[26] *Bates* v. *Little Rock,* 361 U. S. 516, 524 (1960).

[27] *Sherbert* v. *Verner,* 374 U. S. 398, 408 (1963).

to insure the continuing availability of issued certificates serves a legitimate and substantial purpose in the system's administration.

O'Brien's argument to the contrary is necessarily premised upon his unrealistic characterization of Selective Service certificates. He essentially adopts the position that such certificates are so many pieces of paper designed to notify registrants of their registration or classification, to be retained or tossed in the wastebasket according to the convenience or taste of the registrant. Once the registrant has received notification, according to this view, there is no reason for him to retain the certificates. O'Brien notes that most of the information on a registration certificate serves no notification purpose at all; the registrant hardly needs to be told his address and physical characteristics. We agree that the registration certificate contains much information of which the registrant needs no notification. This circumstance, however, does not lead to the conclusion that the certificate serves no purpose, but that, like the classification certificate, it serves purposes in addition to initial notification. Many of these purposes would be defeated by the certificates' destruction or mutilation. Among these are:

1. The registration certificate serves as proof that the individual described thereon has registered for the draft. The classification certificate shows the eligibility classification of a named but undescribed individual. Voluntarily displaying the two certificates is an easy and painless way for a young man to dispel a question as to whether he might be delinquent in his Selective Service obligations. Correspondingly, the availability of the certificates for such display relieves the Selective Service System of the administrative burden it would otherwise have in verifying the registration and classification of all suspected delinquents. Further, since both certificates are in the nature of "receipts" attesting that the regis-

trant has done what the law requires, it is in the interest of the just and efficient administration of the system that they be continually available, in the event, for example, of a mix-up in the registrant's file. Additionally, in a time of national crisis, reasonable availability to each registrant of the two small cards assures a rapid and uncomplicated means for determining his fitness for immediate induction, no matter how distant in our mobile society he may be from his local board.

2. The information supplied on the certificates facilitates communication between registrants and local boards, simplifying the system and benefiting all concerned. To begin with, each certificate bears the address of the registrant's local board, an item unlikely to be committed to memory. Further, each card bears the registrant's Selective Service number, and a registrant who has his number readily available so that he can communicate it to his local board when he supplies or requests information can make simpler the board's task in locating his file. Finally, a registrant's inquiry, particularly through a local board other than his own, concerning his eligibility status is frequently answerable simply on the basis of his classification certificate; whereas, if the certificate were not reasonably available and the registrant were uncertain of his classification, the task of answering his questions would be considerably complicated.

3. Both certificates carry continual reminders that the registrant must notify his local board of any change of address, and other specified changes in his status. The smooth functioning of the system requires that local boards be continually aware of the status and whereabouts of registrants, and the destruction of certificates deprives the system of a potentially useful notice device.

4. The regulatory scheme involving Selective Service certificates includes clearly valid prohibitions against the alteration, forgery, or similar deceptive misuse of certifi-

cates. The destruction or mutilation of certificates obviously increases the difficulty of detecting and tracing abuses such as these. Further, a mutilated certificate might itself be used for deceptive purposes.

The many functions performed by Selective Service certificates establish beyond doubt that Congress has a legitimate and substantial interest in preventing their wanton and unrestrained destruction and assuring their continuing availability by punishing people who knowingly and wilfully destroy or mutilate them. And we are unpersuaded that the pre-existence of the nonpossession regulations in any way negates this interest.

In the absence of a question as to multiple punishment, it has never been suggested that there is anything improper in Congress' providing alternative statutory avenues of prosecution to assure the effective protection of one and the same interest. Compare the majority and dissenting opinions in *Gore* v. *United States*, 357 U. S. 386 (1958).[28] Here, the pre-existing avenue of prosecution was not even statutory. Regulations may be modified or revoked from time to time by administrative discretion. Certainly, the Congress may change or supplement a regulation.

Equally important, a comparison of the regulations with the 1965 Amendment indicates that they protect overlapping but not identical governmental interests, and that they reach somewhat different classes of wrongdoers.[29] The gravamen of the offense defined by the statute is the deliberate rendering of certificates unavailable for the various purposes which they may serve. Whether registrants keep their certificates in their per-

[28] Cf. *Milanovich* v. *United States*, 365 U. S. 551 (1961); *Heflin* v. *United States*, 358 U. S. 415 (1959); *Prince* v. *United States*, 352 U. S. 322 (1957).

[29] Cf. *Milanovich* v. *United States*, 365 U. S. 551 (1961); *Heflin* v. *United States*, 358 U. S. 415 (1959); *Prince* v. *United States*, 352 U. S. 322 (1957).

sonal possession at all times, as required by the regulations, is of no particular concern under the 1965 Amendment, as long as they do not mutilate or destroy the certificates so as to render them unavailable. Although as we note below we are not concerned here with the nonpossession regulations, it is not inappropriate to observe that the essential elements of nonpossession are not identical with those of mutilation or destruction. Finally, the 1965 Amendment, like § 12 (b) which it amended, is concerned with abuses involving *any* issued Selective Service certificates, not only with the registrant's own certificates. The knowing destruction or mutilation of someone else's certificates would therefore violate the statute but not the nonpossession regulations.

We think it apparent that the continuing availability to each registrant of his Selective Service certificates substantially furthers the smooth and proper functioning of the system that Congress has established to raise armies. We think it also apparent that the Nation has a vital interest in having a system for raising armies that functions with maximum efficiency and is capable of easily and quickly responding to continually changing circumstances. For these reasons, the Government has a substantial interest in assuring the continuing availability of issued Selective Service certificates.

It is equally clear that the 1965 Amendment specifically protects this substantial governmental interest. We perceive no alternative means that would more precisely and narrowly assure the continuing availability of issued Selective Service certificates than a law which prohibits their wilful mutilation or destruction. Compare *Sherbert* v. *Verner*, 374 U. S. 398, 407–408 (1963), and the cases cited therein. The 1965 Amendment prohibits such conduct and does nothing more. In other words, both the governmental interest and the operation of the 1965 Amendment are limited to the noncommuni-

cative aspect of O'Brien's conduct. The governmental interest and the scope of the 1965 Amendment are limited to preventing harm to the smooth and efficient functioning of the Selective Service System. When O'Brien deliberately rendered unavailable his registration certificate, he wilfully frustrated this governmental interest. For this noncommunicative impact of his conduct, and for nothing else, he was convicted.

The case at bar is therefore unlike one where the alleged governmental interest in regulating conduct arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful. In *Stromberg* v. *California*, 283 U. S. 359 (1931), for example, this Court struck down a statutory phrase which punished people who expressed their "opposition to organized government" by displaying "any flag, badge, banner, or device." Since the statute there was aimed at suppressing communication it could not be sustained as a regulation of noncommunicative conduct. See also, *NLRB* v. *Fruit & Vegetable Packers Union*, 377 U. S. 58, 79 (1964) (concurring opinion).

In conclusion, we find that because of the Government's substantial interest in assuring the continuing availability of issued Selective Service certificates, because amended § 462 (b) is an appropriately narrow means of protecting this interest and condemns only the independent noncommunicative impact of conduct within its reach, and because the noncommunicative impact of O'Brien's act of burning his registration certificate frustrated the Government's interest, a sufficient governmental interest has been shown to justify O'Brien's conviction.

III.

O'Brien finally argues that the 1965 Amendment is unconstitutional as enacted because what he calls the "purpose" of Congress was "to suppress freedom of

speech." We reject this argument because under settled principles the purpose of Congress, as O'Brien uses that term, is not a basis for declaring this legislation unconstitutional.

It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive. As the Court long ago stated:

> "The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted." *McCray* v. *United States,* 195 U. S. 27, 56 (1904).

This fundamental principle of constitutional adjudication was reaffirmed and the many cases were collected by Mr. Justice Brandeis for the Court in *Arizona* v. *California,* 283 U. S. 423, 455 (1931).

Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature,[30] because the benefit to sound decision-making in

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[30] The Court may make the same assumption in a very limited and well-defined class of cases where the very nature of the constitutional question requires an inquiry into legislative purpose. The principal class of cases is readily apparent—those in which statutes have been challenged as bills of attainder. This Court's decisions have defined a bill of attainder as a legislative Act which inflicts punishment on named individuals or members of an easily ascertainable group without a judicial trial. In determining whether a particular statute is a bill of attainder, the analysis necessarily requires an inquiry into whether the three definitional elements—specificity in identification, punishment, and lack of a judicial trial—are contained in the statute. The inquiry into whether the challenged statute contains the necessary element of punishment has on occasion led the Court to examine the legislative motive in

this circumstance is thought sufficient to risk the possibility of misreading Congress' purpose. It is entirely a different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork. We decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a "wiser" speech about it.

O'Brien's position, and to some extent that of the court below, rest upon a misunderstanding of *Grosjean* v. *American Press Co.*, 297 U. S. 233 (1936), and *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960). These cases stand, not for the proposition that legislative motive is a proper basis for declaring a statute unconstitutional, but that the inevitable effect of a statute on its face may render it unconstitutional. Thus, in *Grosjean* the Court, having concluded that the right of publications to be free from certain kinds of taxes was a freedom of the press protected by the First Amendment, struck down a statute which on its face did nothing other than impose

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enacting the statute. See, *e. g.*, *United States* v. *Lovett*, 328 U. S. 303 (1946). Two other decisions not involving a bill of attainder analysis contain an inquiry into legislative purpose or motive of the type that O'Brien suggests we engage in in this case. *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 169–184 (1963); *Trop* v. *Dulles*, 356 U. S. 86, 95–97 (1958). The inquiry into legislative purpose or motive in *Kennedy* and *Trop*, however, was for the same limited purpose as in the bill of attainder decisions—*i. e.*, to determine whether the statutes under review were punitive in nature. We face no such inquiry in this case. The 1965 Amendment to § 462 (b) was clearly penal in nature, designed to impose criminal punishment for designated acts.

just such a tax. Similarly, in *Gomillion,* the Court sustained a complaint which, if true, established that the "inevitable effect," 364 U. S., at 341, of the redrawing of municipal boundaries was to deprive the petitioners of their right to vote for no reason other than that they were Negro. In these cases, the purpose of the legislation was irrelevant, because the inevitable effect—the "necessary scope and operation," *McCray* v. *United States,* 195 U. S. 27, 59 (1904)—abridged constitutional rights. The statute attacked in the instant case has no such inevitable unconstitutional effect, since the destruction of Selective Service certificates is in no respect inevitably or necessarily expressive. Accordingly, the statute itself is constitutional.

We think it not amiss, in passing, to comment upon O'Brien's legislative-purpose argument. There was little floor debate on this legislation in either House. Only Senator Thurmond commented on its substantive features in the Senate. 111 Cong. Rec. 19746, 20433. After his brief statement, and without any additional substantive comments, the bill, H. R. 10306, passed the Senate. 111 Cong. Rec. 20434. In the House debate only two Congressmen addressed themselves to the Amendment—Congressmen Rivers and Bray. 111 Cong. Rec. 19871, 19872. The bill was passed after their statements without any further debate by a vote of 393 to 1. It is principally on the basis of the statements by these three Congressmen that O'Brien makes his congressional-"purpose" argument. We note that if we were to examine legislative purpose in the instant case, we would be obliged to consider not only these statements but also the more authoritative reports of the Senate and House Armed Services Committees. The portions of those reports explaining the purpose of the Amendment are reproduced in the Appendix in their entirety. While both reports make clear a concern with the "defiant"

destruction of so-called "draft cards" and with "open" encouragement to others to destroy their cards, both reports also indicate that this concern stemmed from an apprehension that unrestrained destruction of cards would disrupt the smooth functioning of the Selective Service System.

IV.

Since the 1965 Amendment to § 12 (b)(3) of the Universal Military Training and Service Act is constitutional as enacted and as applied, the Court of Appeals should have affirmed the judgment of conviction entered by the District Court. Accordingly, we vacate the judgment of the Court of Appeals, and reinstate the judgment and sentence of the District Court. This disposition makes unnecessary consideration of O'Brien's claim that the Court of Appeals erred in affirming his conviction on the basis of the nonpossession regulation.[31]

It is so ordered.

MR. JUSTICE MARSHALL took no part in the consideration or decision of these cases.

APPENDIX TO OPINION OF THE COURT.

PORTIONS OF THE REPORTS OF THE COMMITTEES ON ARMED SERVICES OF THE SENATE AND HOUSE EXPLAINING THE 1965 AMENDMENT.

The "Explanation of the Bill" in the Senate Report is as follows:

"Section 12 (b)(3) of the Universal Military Training and Service Act of 1951, as amended, provides, among other things, that a person who forges, alters, or changes

[31] The other issues briefed by O'Brien were not raised in the petition for certiorari in No. 232 or in the cross-petition in No. 233. Accordingly, those issues are not before the Court.

a draft registration certificate is subject to a fine of not more than $10,000 or imprisonment of not more than 5 years, or both. There is no explicit prohibition in this section against the knowing destruction or mutilation of such cards.

"The committee has taken notice of the defiant destruction and mutilation of draft cards by dissident persons who disapprove of national policy. If allowed to continue unchecked this contumacious conduct represents a potential threat to the exercise of the power to raise and support armies.

"For a person to be subject to fine or imprisonment the destruction or mutilation of the draft card must be 'knowingly' done. This qualification is intended to protect persons who lose or mutilate draft cards accidentally." S. Rep. No. 589, 89th Cong., 1st Sess. (1965).

And the House Report explained:

"Section 12 (b)(3) of the Universal Military Training and Service Act of 1951, as amended, provides that a person who forges, alters, or in any manner changes his draft registration card, or any notation duly and validly inscribed thereon, will be subject to a fine of $10,000 or imprisonment of not more than 5 years. H. R. 10306 would amend this provision to make it apply also to those persons who knowingly destroy or knowingly mutilate a draft registration card.

"The House Committee on Armed Services is fully aware of, and shares in, the deep concern expressed throughout the Nation over the increasing incidences in which individuals and large groups of individuals openly defy and encourage others to defy the authority of their Government by destroying or mutilating their draft cards.

"While the present provisions of the Criminal Code with respect to the destruction of Government property

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may appear broad enough to cover all acts having to do with the mistreatment of draft cards in the possession of individuals, the committee feels that in the present critical situation of the country, the acts of destroying or mutilating these cards are offenses which pose such a grave threat to the security of the Nation that no question whatsoever should be left as to the intention of the Congress that such wanton and irresponsible acts should be punished.

"To this end, H. R. 10306 makes specific that knowingly mutilating or knowingly destroying a draft card constitutes a violation of the Universal Military Training and Service Act and is punishable thereunder; and that a person who does so destroy or mutilate a draft card will be subject to a fine of not more than $10,000 or imprisonment of not more than 5 years." H. R. Rep. No. 747, 89th Cong., 1st Sess. (1965).

MR. JUSTICE HARLAN, concurring.

The crux of the Court's opinion, which I join, is of course its general statement, *ante*, at 377, that:

> "a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

I wish to make explicit my understanding that this passage does not foreclose consideration of First Amendment claims in those rare instances when an "incidental" restriction upon expression, imposed by a regulation which furthers an "important or substantial" governmental interest and satisfies the Court's other criteria, in practice has the effect of entirely preventing a "speaker"

from reaching a significant audience with whom he could not otherwise lawfully communicate. This is not such a case, since O'Brien manifestly could have conveyed his message in many ways other than by burning his draft card.

MR. JUSTICE DOUGLAS, dissenting.

The Court states that the constitutional power of Congress to raise and support armies is "broad and sweeping" and that Congress' power "to classify and conscript manpower for military service is 'beyond question.' " This is undoubtedly true in times when, by declaration of Congress, the Nation is in a state of war. The underlying and basic problem in this case, however, is whether conscription is permissible in the absence of a declaration of war.[1] That question has not been briefed nor was it presented in oral argument; but it is, I submit, a question upon which the litigants and the country are entitled to a ruling. I have discussed in *Holmes* v. *United States, post,* p. 936, the nature of the legal issue and it will be seen from my dissenting opinion in that case that this Court has never ruled on

[1] Neither of the decisions cited by the majority for the proposition that Congress' power to conscript men into the armed services is " 'beyond question' " concerns peacetime conscription. As I have shown in my dissenting opinion in *Holmes* v. *United States, post,* p. 936, the *Selective Draft Law Cases,* 245 U. S. 366, decided in 1918, upheld the constitutionality of a conscription act passed by Congress more than a month after war had been declared on the German Empire and which was then being enforced in time of war. *Lichter* v. *United States,* 334 U. S. 742, concerned the constitutionality of the Renegotiation Act, another wartime measure, enacted by Congress over the period of 1942–1945 (*id.,* at 745, n. 1) and applied in that case to excessive war profits made in 1942–1943 (*id.,* at 753). War had been declared, of course, in 1941 (55 Stat. 795). The Court referred to Congress' power to raise armies in discussing the "background" (334 U. S., at 753) of the Renegotiation Act, which it upheld as a valid exercise of the War Power.

the question. It is time that we made a ruling. This case should be put down for reargument and heard with *Holmes* v. *United States* and with *Hart* v. *United States*, *post*, p. 956, in which the Court today denies certiorari.[2]

The rule that this Court will not consider issues not raised by the parties is not inflexible and yields in "exceptional cases" (*Duignan* v. *United States*, 274 U. S. 195, 200) to the need correctly to decide the case before the court. *E. g.*, *Erie R. Co.* v. *Tompkins*, 304 U. S. 64; *Terminiello* v. *Chicago*, 337 U. S. 1.

In such a case it is not unusual to ask for reargument (*Sherman* v. *United States*, 356 U. S. 369, 379, n. 2, Frankfurter, J., concurring) even on a constitutional question not raised by the parties. In *Abel* v. *United States*, 362 U. S. 217, the petitioner had conceded that an administrative deportation arrest warrant would be valid for its limited purpose even though not supported by a sworn affidavit stating probable cause; but the Court ordered reargument on the question whether the warrant had been validly issued in petitioner's case. 362 U. S., at 219, n., par. 1; 359 U. S. 940. In *Lustig* v. *United States*, 338 U. S. 74, the petitioner argued that an exclusionary rule should apply to the fruit of an unreasonable search by state officials solely because they acted in concert with federal officers (see *Weeks* v. *United States*, 232 U. S. 383; *Byars* v. *United States*, 273 U. S. 28). The Court ordered reargument on the question raised in a then pending case, *Wolf* v. *Colorado*, 338 U. S. 25: applicability of the Fourth Amendment to the States. U. S. Sup. Ct. Journal, October Term, 1947, p. 298. In *Donaldson* v. *Read Magazine*, 333 U. S. 178, the only issue presented,

[2] Today the Court also denies stays in *Shiffman* v. *Selective Service Board No. 5*, and *Zigmond* v. *Selective Service Board No. 16*, *post*, p. 930, where punitive delinquency regulations are invoked against registrants, decisions that present a related question.

according to both parties, was whether the record contained sufficient evidence of fraud to uphold an order of the Postmaster General. Reargument was ordered on the constitutional issue of abridgment of First Amendment freedoms. 333 U. S., at 181–182; Journal, October Term, 1947, p. 70. Finally, in *Musser* v. *Utah*, 333 U. S. 95, 96, reargument was ordered on the question of unconstitutional vagueness of a criminal statute, an issue not raised by the parties but suggested at oral argument by Justice Jackson. Journal, October Term, 1947, p. 87.

These precedents demonstrate the appropriateness of restoring the instant case to the calendar for reargument on the question of the constitutionality of a peacetime draft and having it heard with *Holmes* v. *United States* and *Hart* v. *United States*.

PUYALLUP TRIBE *v.* DEPARTMENT OF GAME OF WASHINGTON ET AL.

CERTIORARI TO THE SUPREME COURT OF WASHINGTON.

No. 247. Argued March 25–26, 1968.—Decided May 27, 1968.*

Respondents brought these actions in the state court seeking declaratory relief concerning rights which petitioner Indians asserted by virtue of Article III of the Treaty of Medicine Creek made with the Puyallup and Nisqually Indians and certain conservation measures adopted by the State of Washington with respect to its territorial waters. Under that provision of the treaty the "right of taking fish at all usual and accustomed grounds and stations, is . . . secured to said Indians, in common with all citizens of the Territory . . . ." The fish to which the Treaty rights in these cases relate are salmon and steelhead, anadromous fish that hatch in the fresh water of the Puyallup and Nisqually Rivers. To catch these fish for their own use and for commercial purposes, the Indians have used set nets which Washington undertook to regulate. The State Supreme Court held that these fishing rights can be regulated by the State and remanded the causes to the trial court to determine if the regulations were reasonable and necessary. *Held:*

1. The State may in the interest of conservation regulate fishing by the Indians "in common with" the fishing by others. Pp. 397–401.

2. Whether the use of set nets at locations where the Indians placed them is permissible is a question not reached on the record. Pp. 401–403.

No. 247, 70 Wash. 2d 245, 422 P. 2d 754; No. 319, 70 Wash. 2d 275, 422 P. 2d 771, affirmed.

Arthur Knodel argued the cause and filed briefs for petitioner in No. 247. *Jack E. Tanner* argued the cause and filed a brief for petitioners in No. 319.

Joseph L. Coniff, Special Assistant Attorney General of Washington, and *Mike R. Johnston,* Assistant Attor-

*Together with No. 319, *Kautz et al.* v. *Department of Game of Washington et al.,* also on certiorari to the same court.

ney General, argued the cause for respondents in both cases. With them on the briefs was *John J. O'Connell,* Attorney General.

John S. Martin, Jr., argued the cause for the United States, as *amicus curiae,* urging reversal in both cases. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Martz, Louis F. Claiborne, Roger P. Marquis,* and *Edmund B. Clark.*

George S. Woodworth, Assistant Attorney General, argued the cause for the State of Oregon, as *amicus curiae,* urging affirmance in both cases. With him on the brief were *Robert Y. Thornton,* Attorney General, and *Roy C. Atchison* and *Henry S. Kane,* Assistant Attorneys General. *T. J. Jones III* argued the cause for the State of Idaho Fish and Game Department, as *amicus curiae,* urging affirmance in both cases. With him on the brief was *Allan G. Shepard,* Attorney General of Idaho.

Briefs of *amici curiae,* urging reversal in No. 247, were filed by *Arthur Lazarus, Jr.,* for the Association on American Indian Affairs, Inc., by *Albert J. Ahern* for the National Congress of American Indians, and by *James B. Hovis* for the Confederated Bands and Tribes of the Yakima Indian Nation.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

These cases present a question of public importance which involves in the first place a construction of the Treaty of Medicine Creek made with the Puyallup and Nisqually Indians in 1854 (10 Stat. 1132) and secondly the constitutionality of certain conservation measures adopted by the State of Washington allegedly impinging on those treaty rights.

These suits were brought by respondents in the state court against the Indians for declaratory relief and for an injunction. The trial court held for respondents and with exceptions not relevant to our problem the Supreme Court affirmed in part and remanded for further findings on the conservation aspect of the problem. *Department of Game* v. *Puyallup Tribe*, 70 Wash. 2d 245, 422 P. 2d 754; *Department of Game* v. *Kautz*, 70 Wash. 2d 275, 422 P. 2d 771. We granted the petitions for certiorari and consolidated the cases for oral argument. 389 U. S. 1013.

While the Treaty of Medicine Creek created a reservation for these Indians, no question as to the extent of those reservation rights, if any, is involved here.[1] Our

[1] It should be noted that while a reservation was created by Article II of the Treaty, Article VI provided that the President might remove the Indians from the reservation "on remunerating them for their improvements and the expenses of their removal, or may consolidate them with other friendly tribes or bands." Article VI also gave the President authority alternatively to divide the reservation into lots and assign them to those individuals or families who were willing to make these places their permanent home. In 1887 Congress passed the General Allotment Act (24 Stat. 388) authorizing the division of the reservation land among the individual Indians. In 1893 Congress passed the Puyallup Allotment Act, 27 Stat. 633, which established a commission to make the allotments. And by the Act of April 28, 1904, 33 Stat. 565, Congress gave "the consent of the United States" to the removal of prior restrictions on alienation by these Indians. The trial court in No. 247 found that all lands within the boundaries of the reservation created by the Treaty have been transferred to private ownership pursuant to these Acts of Congress, with the exception of two small tracts used as a cemetery for members of the tribe; and much of it is now in the City of Tacoma. See *State* v. *Satiacum*, 50 Wash. 2d 513, 314 P. 2d 400 (1957). Whether in light of this history the reservation has been extinguished is a question we do not reach. Cf. *Seymour* v. *Superintendent*, 368 U. S. 351, 356–359. The Washington Supreme Court seems to hold that the right to fish in streams once within the old reservation is protected by the Article III guarantee. See 70 Wash. 2d, at 261, 262, 422 P. 2d, at 763, 764. There are

question concerns the fishing rights protected by Article III, which so far as relevant reads as follows:

> "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands . . . ."

The fish to which the Treaty rights pertain in these cases are salmon and steelhead, anadromous fish that hatch in the fresh water of the Puyallup River and the Nisqually River. The steelhead is a trout; the salmon are of four species—chinook, silver, chum, and pink. They come in from the ocean, pass through the salt water of Puget Sound, enter the fresh waters at the mouths of rivers, and go up these rivers to spawn. The adult salmon die after spawning, but not necessarily the steelhead. In time the fry return to the ocean and start the cycle anew.

People fish for these species far offshore.[2] As respects fishing within its territorial waters, Washington specifies the time when fishing may take place, the areas open to fishing, and the gear that may be used.[3]

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indeed no other fishing rights specifically reserved in the Treaty of Medicine Creek except those covered by Article III.

[2] Fishing for salmon in the high seas is governed by a convention agreed to by Canada, Japan, and the United States on May 9, 1952. 4 U. S. T., Pt. I, p. 380, T. I. A. S. No. 2786. As to sockeye salmon and pink salmon, the United States and Canada have a separate convention first signed May 26, 1930, and amended as of July 3, 1957. 8 U. S. T., Pt. I, p. 1057, T. I. A. S. No. 3867.

Washington bars the use of nets in fishing for salmon in the international waters of the Pacific. Wash. Rev. Code § 75.12.220.

[3] Wash. Admin. Code §§ 220–16–010 to 220–48–060 (salmon); Wash. Dept. of Game, Perm. Regs. Nos. 32–35 (1964), Temp. Reg. No. 273 (1968) (steelhead).

Fishing licenses are prescribed.[4] Steelhead may be taken only by hook[5] and not commercially. Salmon may be taken commercially with nets of a certain type in certain areas.[6] Set nets or fixed appliances are barred in "any waters" of the State for the taking of salmon or steelhead.[7] So is "monofilament gill net webbing."[8]

Nearly every river in the State has a salmon preserve at its mouth;[9] and Commencement Bay at the mouth of the Puyallup River is one of those preserves.[10]

The Puyallup Indians use set nets to fish in Commencement Bay and at the mouth of the Puyallup River and in areas upstream. The Nisqually Indians use set nets in the fresh waters of the Nisqually River. These Indians fish not only for their own needs but commercially as well, supplying the markets with a large volume of salmon. The nets used are concededly illegal if the laws and regulations of the State of Washington are valid; and it is to that question that we now turn.[11]

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[4] Wash. Rev. Code §§ 75.28.010–75.28.380; §§ 77.32.005–77.32.280.

[5] Wash. Dept. of Game, Perm. Reg. No. 34 (1964).

[6] Wash. Rev. Code § 75.12.140 defines the permissible areas for reef net fishing. Section 75.12.010, while containing a prohibition against commercial fishing in a large salt water area, allows the director of fisheries to permit commercial fishing there within stated times and with prescribed gear. And see Wash. Admin. Code §§ 220–32–010 to 220–32–030 (Columbia River area); §§ 220–36–010 to 220–36–020 (Grays Harbor area); §§ 220–40–010 to 220–40–020 (Willapa Harbor area); §§ 220–48–010 to 220–48–060 (Puget Sound area). Commercial fishing in other areas is banned. Wash. Rev. Code § 75.12.160; Wash. Admin. Code § 220–20–010.

[7] Wash. Rev. Code §§ 75.12.060, 77.16.060.

[8] Wash. Rev. Code § 75.12.280. It appears that the monofilament type of gear (made of plastic) is less visible in clear water in daylight than the nylon web.

[9] Wash. Admin. Code § 220–48–020.

[10] Wash. Admin. Code § 220–48–020 (10).

[11] Petitioners in No. 247 argue that the Washington courts lacked jurisdiction to entertain an action against the tribe without the

The "right of taking fish at all usual and accustomed places, in common with" citizens of the Territory under a treaty with the Yakimas was involved in *United States* v. *Winans,* 198 U. S. 371. The lands bordering the Columbia River at those places were acquired by private owners who under license from the State acquired the right to fish there and sought to exclude the Indians by reason of their ownership. The Court held that the right to fish at these places was a "continuing" one that could not be destroyed by a change in ownership of the land bordering the river. 198 U. S., at 381. To construe the treaty as giving the Indians "no rights but such as they would have without the treaty" (198 U. S., at 380) would be "an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more." *Ibid.* In *Seufert Bros. Co.* v. *United States,* 249 U. S. 194, the Court construed the same provision liberally so as to include all "accustomed places" even though the Indians shared those places with other Indians and with white men, rejecting a strict, technical construction not in keeping with the justice of the case.

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consent of the tribe or the United States Government (citing *United States* v. *United States Fidelity & Guaranty Co.,* 309 U. S. 506, and *Turner* v. *United States,* 248 U. S. 354), viewing the suit as one to "extinguish a Tribal communal fishing right guaranteed by federal Treaty." This case, however, is a suit to enjoin violations of state law by individual tribal members fishing off the reservation. As such, it is analogous to prosecution of individual Indians for crimes committed off reservation lands, a matter for which there has been no grant of exclusive jurisdiction to federal courts. See, *e. g., DeMarrias* v. *South Dakota,* 319 F. 2d 845 (C. A. 8th Cir. 1963); *Buckman* v. *State,* 139 Mont. 630, 366 P. 2d 346 (1961). With respect to crimes committed by Indians within reservation boundaries, see 18 U. S. C. §§ 1153, 1162. And see § 401 (a) of Title IV of the 1968 Civil Rights Act, Pub. L. No. 90–284, 82 Stat. 78; *Seymour* v. *Superintendent,* 368 U. S. 351; *United States* v. *Celestine,* 215 U. S. 278.

It is in that spirit that we approach these cases in determining the scope of the treaty rights which the Puyallups and Nisqually obtained.

The treaty right is in terms the right to fish "at all usual and accustomed places." We assume that fishing by nets was customary at the time of the Treaty; and we also assume that there were commercial aspects to that fishing as there are at present. But the *manner* in which the fishing may be done and its purpose, whether or not commercial, are not mentioned in the Treaty. We would have quite a different case if the Treaty had preserved the right to fish at the "usual and accustomed places" *in the "usual and accustomed" manner.* But the Treaty is silent as to the mode or modes of fishing that are guaranteed. Moreover, the right to fish at those respective places is not an exclusive one. Rather, it is one "in common with all citizens of the Territory." Certainly the right of the latter may be regulated. And we see no reason why the right of the Indians may not also be regulated by an appropriate exercise of the police power of the State. The right to fish "at all usual and accustomed" places may, of course, not be qualified by the State, even though all Indians born in the United States are now citizens of the United States. Act of June 2, 1924, 43 Stat. 253, as superseded by § 201 (b) of the Nationality Act of 1940, 8 U. S. C. § 1401 (a)(2). But the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians.

In *Tulee* v. *Washington,* 315 U. S. 681, we had before us for construction a like treaty with the Yakima Indians which guaranteed the right to fish "at all usual and accustomed places, in common with the citizens" of Wash-

ington Territory. 12 Stat. 951. Tulee, a member of the tribe, was fishing without a license off the Yakima Indian Reservation; the State convicted him for failure to obtain a license. We reversed, saying:

> "[W]hile the treaty leaves the state with power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish, it forecloses the state from charging the Indians a fee of the kind in question here." *Id.*, at 684.

In other words, the "right" to fish outside the reservation was a treaty "right" that could not be qualified or conditioned by the State. But "the time and manner of fishing . . . necessary for the conservation of fish," not being defined or established by the treaty, were within the reach of state power.

The overriding police power of the State, expressed in nondiscriminatory measures for conserving fish resources, is preserved. In *United States* v. *Winans, supra*, a forerunner of the *Tulee* case, the Court said:

> "[S]urely it was within the competency of the Nation to secure to the Indians such a remnant of the great rights they possessed as 'taking fish at all usual and accustomed places.' Nor does it restrain the State unreasonably, if at all, in the regulation of the right." 198 U. S., at 384.

Another forerunner of *Tulee* was *Kennedy* v. *Becker*, 241 U. S. 556, which also involved a nonexclusive grant of fishing rights to Indians. Indians were charged with the spearing of fish contrary to New York law, their defense being the fishing rights granted by a treaty. The Court, in sustaining the judgments of conviction, said:

> "We do not think that it is a proper construction of the reservation in the conveyance to regard it as

> an attempt either to reserve sovereign prerogative or so to divide the inherent power of preservation as to make its competent exercise impossible. Rather are we of the opinion that the clause is fully satisfied by considering it a reservation of a privilege of fishing and hunting upon the granted lands in common with the grantees, and others to whom the privilege might be extended, but subject nevertheless to that necessary power of appropriate regulation, as to all those privileged, which inhered in the sovereignty of the State over the lands where the privilege was exercised." 241 U. S., at 563–564.

The use of purse seines and other nets [12] in the salt waters is permitted for commercial purposes under terms and conditions prescribed by the State; and their use in these areas is open to all, Indians as well as others. The use of set nets [13] in fresh water streams or at their mouths is barred not only to Indians but to all others.

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[12] A purse seine is a type of gear that encircles a school of fish, lead weights taking the net down, and a boat operating at each end of the net. A line runs through rings on the bottom of the net, making it possible to close the bottom of the net. Wash. Admin. Code § 220–16–010 (15).

A gill net has a mesh which fish cannot back out of once their heads get through. Gill net fishing is drift fishing, the net being up to 1,800 feet in length. Wash. Admin. Code § 220–16–010 (8).

Purse seines and drift gill nets are used in salt water.

[13] Set gill nets are often anchored at one end, stretched on a cork line, and held down by weights, while drifting at the other end. They are often located one above another at a short distance. Fish are taken by hand out of the nets as a boat travels its length. The mesh in the gill net varies, depending on the size of the species of salmon that are running—chinook, 8 to 8½ inches; silver, chum, and sockeye, 5½ inches. Set gill nets run from 40 to 150 feet depending on the width of the river at the point they are used. Wash. Admin. Code § 220–16–010 (19).

An expert for the State testified that the reason for that prohibition was conservation:

> "The salmon are milling and delaying, and especially in times of low water or early arrival of the run or for any number of reasons, the delay may be considerable.
>
> "Once again the fish are available to the net again and again. This is the main reason for the preserve, so that the milling stock will not be completely taken.
>
> "Then further, this is a point in the bay at the river mouth where you very definitely have a funnelling effect. The entire run is funneled into a smaller area and it is very vulnerable."

Fishing by hook and line is allowed in these areas because when salmon are "milling near the river mouth," they are not "feeding and they don't strike very well, so the hook and line fishery will take but a small percentage of the available stock no matter how hard they fish."

Whether the prohibition of the use of set nets in these fresh waters was a "reasonable and necessary" (70 Wash. 2d, at 261, 422 P. 2d, at 764) conservation measure [14] was

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[14] Much emphasis is placed on *Maison* v. *Confederated Tribes,* 314 F. 2d 169 (C. A. 9th Cir. 1963), where another treaty right pertaining to other Indians was tendered in opposition to Oregon's power to regulate salmon fishing in the interests of conservation. This Treaty gave the Indians the right to fish off the reservation at all "usual and accustomed stations in common with citizens of the United States." *Id.,* at 170. The Court of Appeals held that Oregon could regulate the Indians' Treaty right to fish under two conditions: "*first,* that there is a need to limit the taking of fish, *second,* that the particular regulation sought to be imposed is 'indispensable' to the accomplishment of the needed limitation." *Id.,* at 172.

The idea that the conservation measure be "indispensable" is derived from *Tulee* v. *Washington, supra,* where in striking down the license fee we said that "the imposition of license fees is not

left for determination by the trial court when the Supreme Court, deeming the injunction in No. 247 too broad, remanded the case for further findings.[15] When

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indispensable to the effectiveness of a state conservation program." 315 U. S., at 685. But that statement in its context meant no more than that it would, indeed, be unusual for a State to have the power to tax the exercise of a "federal right." As stated by the Court in the sentence immediately following, the license fee "acts upon the Indians as a charge for exercising the very right their ancestors intended to reserve." *Ibid.* Cf. *Murdock* v. *Pennsylvania,* 319 U. S. 105, 112: "The power to tax the exercise of a privilege is the power to control or suppress its enjoyment."

As to a "regulation" concerning the time and manner of fishing outside the reservation (as opposed to a "tax"), we said that the power of the State was to be measured by whether it was "necessary for the conservation of fish." 315 U. S., at 684.

The measure of the legal propriety of those kinds of conservation measures is therefore distinct from the federal constitutional standard concerning the scope of the police power of a State. See *Ferguson* v. *Skrupa,* 372 U. S. 726; *Williamson* v. *Lee Optical Co.,* 348 U. S. 483; *Daniel* v. *Family Ins. Co.,* 336 U. S. 220; *Olsen* v. *Nebraska,* 313 U. S. 236.

[15] In No. 319, the parties entered into a stipulation of facts which, because of its scope, made unnecessary "the tailoring of the injunction to meet a specific situation, as in the *Puyallup* case . . . ." 70 Wash. 2d, at 280, 422 P. 2d, at 774. The Washington Supreme Court did, however, remand to the trial court with instructions to limit the injunction only to those violations of Washington law that had been stipulated to be presently necessary to the conservation of the fish runs. It was stipulated that the "usual and accustomed fishing grounds" (within the meaning of the Treaty) encompassed the Nisqually River and its tributaries downstream from the Nisqually Reservation. The parties further stipulated that the defendants had fished contrary to state fishing conservation laws and regulations since 1960; that "[i]f permitted to continue, the defendants' commercial fishery would virtually exterminate the salmon and steelhead fish runs of the Nisqually River"; and that "it is necessary for proper conservation of the salmon and steelhead fish runs of the Nisqually River . . . that the plaintiffs enforce state fishery conservation laws and regulations to the fishing activities of the defendants at their usual and accustomed grounds."

the case was argued here, much was said about the *pros* and the *cons* of that issue. Since the state court has given us no authoritative answer to the question, we leave it unanswered and only add that any ultimate findings on the conservation issue must also cover the issue of equal protection implicit in the phrase "in common with."

Affirmed.

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MENOMINEE TRIBE OF INDIANS *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

No. 187. Argued January 22, 1968.—Reargued April 25, 1968.—Decided May 27, 1968.

The Menominee Tribe of Indians brought this action in the Court of Claims to recover compensation for the loss of their hunting and fishing rights, which the Wisconsin Supreme Court in another proceeding had held had been abrogated by the Menominee Termination Act of 1954. The Termination Act, which did not become fully effective until 1961, provided for the termination of federal supervision over the property and members of the tribe, whereupon state laws were to become applicable to them in the same manner as they applied to others. The same Congress that passed that Act also enacted Public Law 280, which two months after the Termination Act became law was amended to apply specifically to the Menominee Reservation. Public Law 280 granted to certain States, including Wisconsin, general jurisdiction over "Indian country" within their boundaries, but with the proviso that "Nothing in this section . . . shall deprive any Indian or Indian tribe . . . of any right, privilege, or immunity afforded under Federal treaty . . . with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof." The Court of Claims in light of Public Law 280 held that the Termination Act did not extinguish the tribe's hunting and fishing rights but that these were retained under the Treaty of Wolf River of 1854, whereby the United States had set aside land for the Menominees "for a home, to be held as Indian lands are held." Both petitioner and respondent on oral argument here have urged affirmance of the Court of Claims judgment; the State of Wisconsin, appearing as *amicus curiae*, has argued for reversal.

Held:

1. The language in the Treaty of Wolf River "to be held as Indian lands are held" includes the right to fish and to hunt. Pp. 405–406.

2. The Menominee Tribe's hunting and fishing rights under the Treaty survived the Termination Act of 1954. Pp. 410–413.

(a) In 1954, when Public Law 280, as amended, took effect, the Menominee Reservation was still "Indian country" within the meaning of that law. P. 411.

(b) Public Law 280 must be considered *in pari materia* with the Termination Act and the two Acts read together mean that although federal supervision of the tribe was to cease and all tribal property was to be transferred to new hands, the hunting and fishing rights granted or preserved by the Treaty survived the Termination Act. 411–413.

(c) The purpose to abrogate treaty rights of Indians is not to be lightly imputed to Congress. Pp. 412–413.

179 Ct. Cl. 496, 388 F. 2d 998, affirmed.

Charles A. Hobbs reargued the cause for petitioner. With him on the briefs on the reargument and on the original argument were *John W. Cragun, Angelo A. Iadarola,* and *James R. Modrall III.*

Louis F. Claiborne reargued the cause for the United States. With him on the brief on the reargument were *Solicitor General Griswold* and *Assistant Attorney General Martz,* and on the original argument *Mr. Griswold, Acting Assistant Attorney General Harrison,* and *Roger P. Marquis.*

Bronson C. La Follette, Attorney General of Wisconsin, argued the cause on the reargument for the State of Wisconsin, as *amicus curiae.* With him on the briefs was *William F. Eich,* Assistant Attorney General.

Briefs of *amici curiae* were filed by *Albert J. Ahern* for the National Congress of American Indians, and by *Arthur Lazarus, Jr.,* for the Association of American Indian Affairs, Inc.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The Menominee Tribe of Indians was granted a reservation in Wisconsin by the Treaty of Wolf River in 1854. 10 Stat. 1064. By this treaty the Menominees retroceded certain lands they had acquired under an earlier treaty and the United States confirmed to them the Wolf River Reservation "for a home, to be held as Indian lands

are held." Nothing was said in the 1854 treaty about hunting and fishing rights. Yet we agree with the Court of Claims [1] that the language "to be held as Indian lands are held" includes the right to fish and to hunt. The record shows that the lands covered by the Wolf River Treaty of 1854 were selected precisely because they had an abundance of game. See *Menominee Tribe* v. *United States*, 95 Ct. Cl. 232, 240–241 (1941). The essence of the Treaty of Wolf River was that the Indians were authorized to maintain on the new lands ceded to them as a reservation their way of life which included hunting and fishing.[2]

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[1] *Menominee Tribe* v. *United States*, 179 Ct. Cl. 496, 503–504, 388 F. 2d 998, 1002.

[2] As stated by the Supreme Court of Wisconsin:

"It would seem unlikely that the Menominees would have knowingly relinquished their special fishing and hunting rights which they enjoyed on their own lands, and have accepted in exchange other lands with respect to which such rights did not extend. They undoubtedly believed that these rights were guaranteed to them when these other lands were ceded to them 'to be held as Indian lands are held.' Construing this ambiguous provision of the 1854 treaty favorably to the Menominees, we determine that they enjoyed the same exclusive hunting rights free from the restrictions of the state's game laws over the ceded lands, which comprised the Menominee Indian Reservation, as they had enjoyed over the lands ceded to the United States by the 1848 treaty." *State* v. *Sanapaw*, 21 Wis. 2d 377, 383, 124 N. W. 2d 41, 44 (1963).

The Court said in *United States* v. *Winans*, 198 U. S. 371, 380–381, "[W]e will construe a treaty with the Indians as 'that unlettered people' understood it, and 'as justice and reason demand, in all cases where power is exerted by the strong over those to whom they owe care and protection,' and counterpoise the inequality 'by the superior justice which looks only to the substance of the right without regard to technical rules.'"

As the Solicitor General points out in his brief, the words "to be held as Indian lands are held" sum up in a single phrase the familiar provisions of earlier treaties which recognized hunting and fishing as normal incidents of Indian life. See Treaty of January 3, 1786,

What the precise nature and extent of those hunting and fishing rights were we need not at this time determine. For the issue tendered by the present decision of the Court of Claims, 179 Ct. Cl. 496, 388 F. 2d 998, is whether those rights, whatever their precise extent, have been extinguished.

That issue arose because, beginning in 1962, Wisconsin took the position that the Menominees were subject to her hunting and fishing regulations. Wisconsin prosecuted three Menominees for violating those regulations and the Wisconsin Supreme Court held [3] that the state regulations were valid, as the hunting and fishing rights of the Menominees had been abrogated by Congress in the Menominee Indian Termination Act of 1954. 68 Stat. 250, as amended, 25 U. S. C. §§ 891–902.

Thereupon the tribe brought suit in the Court of Claims against the United States to recover just compensation for the loss of those hunting and fishing rights.[4] The Court of Claims by a divided vote held that the tribe possessed hunting and fishing rights under the Wolf River Treaty; but it held, contrary to the Wisconsin Supreme Court, that those rights were not abrogated by the Termination Act of 1954. We granted the petition for a writ of certiorari in order to resolve that conflict between the two courts. 389 U. S. 811. On oral argument both petitioner and respondent urged that the judgment of the Court of Claims be affirmed. The State of Wisconsin appeared as *amicus curiae* and argued that that judgment be reversed.

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with the Choctaws, 7 Stat. 22; Treaty of January 31, 1786, with the Shawnees, 7 Stat. 27; Treaty of January 9, 1789, with the Wyandots, 7 Stat. 29; Treaty of August 3, 1795, with the Wyandots, 7 Stat. 52; Treaty of November 10, 1808, with the Osages, 7 Stat. 109; Treaty of August 24, 1835, with the Comanches, 7 Stat. 475.

[3] *State* v. *Sanapaw*, 21 Wis. 2d 377, 124 N. W. 2d 41.

[4] See *Shoshone Tribe* v. *United States*, 299 U. S. 476.

In 1953 Congress by concurrent resolution [5] instructed the Secretary of the Interior to recommend legislation for the withdrawal of federal supervision over certain American Indian tribes, including the Menominees. Several bills were offered, one for the Menominee Tribe that expressly preserved hunting and fishing rights.[6] But the one that became the Termination Act of 1954, *viz.*, H. R. 2828, did not mention hunting and fishing rights. Moreover, counsel for the Menominees spoke against the bill, arguing that its silence would by implication abolish those hunting and fishing rights.[7] It is therefore argued that they were abolished by the Termination Act.

The purpose of the 1954 Act was by its terms "to provide for orderly termination of Federal supervision over the property and members" of the tribe. Under its provisions, the tribe was to formulate a plan for future control of tribal property and service functions theretofore conducted by the United States. On or before April 30, 1961, the Secretary was to transfer to a tribal corporation or to a trustee chosen by him all property real and personal held in trust for the tribe by the United States.[8]

The Menominees submitted a plan, looking toward the creation of a county in Wisconsin out of the former reservation and the creation by the Indians of a Wisconsin corporation to hold other property of the tribe and its members. The Secretary of the Interior approved the plan [9] with modifications; the Menominee

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[5] H. R. Con. Res. 108, 83d Cong., 1st Sess., 67 Stat. B132.

[6] S. 2813 and H. R. 7135, 83d Cong., 2d Sess.

[7] Joint Hearings, Subcommittees of Committees on Interior and Insular Affairs, 83d Cong., 2d Sess., Pt. 6, on S. 2813, H. R. 2828, and H. R. 7135, pp. 697, 704.

[8] The Termination Act also provided for a closing of the membership roll of the tribe with distribution to the enrollees of certificates of beneficial interest in the tribal property. The roll was closed in December 1957. 22 Fed. Reg. 9951.

[9] 26 Fed. Reg. 3726.

Enterprises, Inc., was incorporated; [10] and numerous ancillary laws were passed by Wisconsin integrating the former reservation into its county system of government.

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[10] Wisconsin questions whether Menominee Enterprises, Inc., to which all tribal assets were conveyed pursuant to the termination plan (26 Fed. Reg. 3726), should be viewed as the successor entity to the tribe and the present holder of the hunting and fishing rights, and, if so, to what extent the corporation or the tribal members thereof can withhold or parcel out these rights.

The Menominees, on the other hand, claim the rights are held by Menominee Indian Tribe of Wisconsin, Inc., a tribal body organized in 1962. Its Articles of Incorporation provide for four categories of membership (Article X): Menominee Indian membership (§ 1 (a)) (all Menominee Indians appearing on the final roll of the tribe approved by the Secretary of the Interior, n. 8, *supra*); Associate membership of Menominee descendants (§ 1 (b)) (any descendants of enrolled Menominee Indians or recipients through inheritance of Menominee Enterprises securities); Associate membership of persons married to enrolled Menominees (§ 1 (c)); and Associate membership of non-Indians (§ 1 (d)). In March 1968, the first category was enlarged by amendment of Art. X, § 1 (a), of the Articles of Incorporation to include all descendants of enrolled Menominee Indians with at least one-quarter Menominee blood, one or both of whose parents resided on the Menominee Reservation at the time of the descendant's birth. The corporation also adopted a resolution defining those persons entitled to exercise the hunting and fishing rights, which provided:

"All tribal members, as defined in Article X of the Articles of Incorporation, Section 1 (a), and only such members, shall have the right to exercise tribal hunting and fishing rights, subject to tribal regulations;

"PROVIDED, HOWEVER, that any member who violates any tribal hunting or fishing regulation may upon finding of the Council of Chiefs be declared ineligible to exercise such rights, for such period of time as the Council of Chiefs may specify."

We believe it inappropriate, however, to resolve the question of who the beneficiaries of the hunting and fishing rights may be; and we expressly reserve decision on it. Neither it nor the nature of those rights nor the extent, if any, to which Wisconsin may regulate them has been fully briefed and argued by the parties either in the Court of Claims or in this Court, and the posture of the present litigation does not require their resolution.

The Termination Act provided that after the transfer by the Secretary of title to the property of the tribe, all federal supervision was to end and "the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction."

It is therefore argued with force that the Termination Act of 1954, which became fully effective in 1961, submitted the hunting and fishing rights of the Indians to state regulation and control. We reach, however, the opposite conclusion. The same Congress that passed the Termination Act also passed Public Law 280, 67 Stat. 588, as amended, 18 U. S. C. § 1162. The latter came out of the same committees of the Senate and the House as did the Termination Act; and it was amended [11] in a way that is critical here only two months after the Termination Act became law. As amended, Public Law 280 granted designated States, including Wisconsin, jurisdiction "over offenses committed by or against Indians in the areas of Indian country" named in the Act, which in the case of Wisconsin was described as "All Indian country within the State." But Public Law 280 went on to say that "Nothing in this section . . . shall deprive any

[11] As originally enacted Public Law 280 exempted the Menominees from its provisions. The House Reports on Pub. L. 280 (H. R. 1063, 83d Cong., 1st Sess.) and on Pub. L. 661 (H. R. 9821, 83d Cong., 2d Sess.) indicate that the Menominees had specifically asked for exemption from the provisions of the bill that eventually became Pub. L. 280, on the ground that their tribal law and order program was functioning satisfactorily. Subsequently, the tribe reconsidered its position and sponsored H. R. 9821, amending Pub. L. 280 to extend its provisions to the Menominee Reservation. The Department of the Interior recommended favorable action on the proposed amendment, and the amendment was enacted into law on August 24, 1954 (68 Stat. 795), two months after the passage of the Menominee Termination Act. See H. R. Rep. No. 848, 83d Cong., 1st Sess., 6 (1953); H. R. Rep. No. 2322, 83d Cong., 2d Sess. (1954).

Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute *with respect to hunting, trapping, or fishing* or the control, licensing, or regulation thereof." (Emphasis added.) That provision on its face contains no limitation; it protects any hunting, trapping, or fishing right granted by a federal treaty. Public Law 280, as amended, became the law in 1954, nearly seven years *before* the Termination Act became fully effective in 1961. In 1954, when Public Law 280 became effective, the Menominee Reservation was still "Indian country" within the meaning of Public Law 280.

Public Law 280 must therefore be considered *in pari materia* with the Termination Act. The two Acts read together mean to us that, although federal supervision of the tribe was to cease and all tribal property was to be transferred to new hands, the hunting and fishing rights granted or preserved by the Wolf River Treaty of 1854 [12] survived the Termination Act of 1954.

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[12] The Act creating the Wisconsin Territory (5 Stat. 10) contained an express reservation of Indian rights, though both the Enabling Act of 1846 (9 Stat. 56), and the Act admitting Wisconsin to the Union in 1848 (9 Stat. 233) were silent on the subject. It was only a few months after Wisconsin achieved statehood that the Menominees ceded all of their Wisconsin lands to the United States in anticipation of the tribe's removal to other lands west of the Mississippi. Treaty of October 18, 1848, 9 Stat. 952. But as already noted, this removal never fully succeeded, and the Menominee Reservation created by the Treaty of Wolf River was carved out of the lands the Indians had previously ceded to the United States.

The State argues that since it was admitted into the Union on an equal footing with the original States, its sovereignty over the lands designated in 1854 as the Menominee Reservation attached in some degree between the time the Indians ceded all of their Wisconsin lands to the United States in 1848 and the time when the United States ceded back a certain portion of those lands for the reservation in 1854. Wisconsin contends that any hunting or fishing privileges

This construction is in accord with the overall legislative plan. The Termination Act by its terms provided for the "orderly termination of Federal *supervision* over the property and members" of the tribe. 25 U. S. C. § 891. (Emphasis added.) The Federal Government ceded to the State of Wisconsin its power of supervision over the tribe and the reservation lands, as evident from the provision of the Termination Act that the laws of Wisconsin "shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within [its] jurisdiction."

The provision of the Termination Act (25 U. S. C. § 899) that "all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe" plainly refers to the termination of federal supervision. The use of the word "statutes" is potent evidence that no *treaty* was in mind.

We decline to construe the Termination Act as a backhanded way of abrogating the hunting and fishing rights of these Indians. While the power to abrogate those

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guaranteed the Menominees free from state regulation did not survive the dissolution of the reservation and the termination of the trusteeship of the United States over the Menominees. At that time, it is said, Wisconsin's long dormant power to exercise jurisdiction over those reservation lands was awakened by the termination of the reservation.

If any hiatus in title to the reservation lands in question occurred between 1848 and 1854, any jurisdiction that the State may have acquired over those would not have survived the Treaty of 1854. The Treaty of Wolf River was, under Article VI of the Constitution, the "supreme law of the land," and the exercise of rights on reservation lands guaranteed to the tribe by the Federal Government would not be subject to state regulation, at least in absence of a cession by Congress. Cf. *Ward* v. *Race Horse*, 163 U. S. 504, 514. In this connection it should be noted that in 1853 the Wisconsin Legislature consented to the establishment of the Menominee Reservation subsequently confirmed by the 1854 Treaty (1853 Wis. Jt. Res., c. I),

rights exists (see *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 564–567) "the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress." *Pigeon River Co.* v. *Cox Co.*, 291 U. S. 138, 160. See also *Squire* v. *Capoeman*, 351 U. S. 1.

Our conclusion is buttressed by the remarks of the legislator chiefly responsible for guiding the Termination Act to enactment, Senator Watkins, who stated upon the occasion of the signing of the bill that it "in no way violates any treaty obligation with this tribe." [13]

We find it difficult to believe that Congress, without explicit statement, would subject the United States to a claim for compensation [14] by destroying property rights conferred by treaty, particularly when Congress was purporting by the Termination Act to settle the Government's financial obligations toward the Indians.[15]

Accordingly the judgment of the Court of Claims is

Affirmed.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

MR. JUSTICE STEWART, with whom MR. JUSTICE BLACK joins, dissenting.

By the Treaty of Wolf River in 1854, 10 Stat. 1064, the United States granted to the Menominee Tribe of

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an action which can be fairly construed as a disclaimer of any jurisdiction the State may have possessed.

[13] 100 Cong. Rec. 8538.

[14] See n. 4, *supra*.

[15] Compare the hearings on the Klamath Termination bill, which took place shortly before the Menominee bills were reached, in which Senator Watkins expressed the view that perhaps the Government should "buy out" the Indians' hunting and fishing rights rather than preserve them after termination. See Joint Hearings, Subcommittees of the Committees on Interior and Insular Affairs, 83d Cong., 2d Sess., Pt. 4, on S. 2745 and H. R. 7320, pp. 254–255.

Indians a reservation "to be held as Indian lands are held." As the Court says, this language unquestionably conferred special hunting and fishing rights within the boundaries of the reservation. One hundred years later, in the Menominee Indian Termination Act of 1954, 68 Stat. 250, 25 U. S. C. §§ 891–902, Congress provided for the termination of the reservation and the transfer of title to a tribal corporation. The Act provided that upon termination of the reservation,

> "[T]he laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction." 25 U. S. C. § 899.[1]

The reservation was formally terminated on April 30, 1961, seven years after the Termination Act, and the State of Wisconsin has ever since subjected the Menominees, just as any other citizens, to its hunting and fishing regulations. *State* v. *Sanapaw*, 21 Wis. 2d 377, 124 N. W. 2d 41.

The Menominees instituted this proceeding against the United States, asking compensation for the taking of their special rights. *Shoshone Tribe* v. *United States*, 299 U. S. 476. The Court of Claims denied compensation on the ground that the Termination Act had not in fact extinguished those rights, and that they remained immune from regulation by Wisconsin. The Court today agrees. I do not.

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[1] The Termination Act was adopted in response to an earlier congressional resolution which stated in part:
"[I]t is the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States . . . ." 67 Stat. B132.

The statute is plain on its face: after termination the Menominees are fully subject to state laws just as other citizens are, and no exception is made for hunting and fishing laws. Nor does the legislative history contain any indication that Congress intended to say anything other than what the unqualified words of the statute express.[2] In fact two bills which would have explicitly preserved hunting and fishing rights[3] were rejected in favor of the bill ultimately adopted[4]—a bill which was opposed by counsel for the Menominees because it failed to preserve their treaty rights.[5]

The Court today holds that the Termination Act does not mean what it says. The Court's reason for reaching this remarkable result is that it finds *"in pari materia"* another statute which, I submit, has nothing whatever to do with this case.

That statute, Public Law 280, 67 Stat. 588, as amended, 68 Stat. 795, 18 U. S. C. § 1162 and 28 U. S. C. § 1360, granted to certain States, including Wisconsin, general jurisdiction over "Indian country" within their bound-

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[2] I cannot attach any significant weight to an offhand remark in a speech made by one Senator after the enactment of the bill. *Ante*, at 413.

It is, of course, irrelevant that the legislative history reveals no intention by the Congress to incur a financial obligation to the Menominees. If what the Congress did took away the Menominees' property rights, then regardless of congressional intent they are entitled to compensation from the United States for the taking.

[3] H. R. 7135 and S. 2813, 83d Cong., 2d Sess.

[4] H. R. 2828, 83d Cong., 2d Sess.

[5] "I think it is clear that [the bill] does affect those treaty rights and that those treaties are abrogated. Certainly it abolishes the tribal right to exclusive hunting and fishing privileges, because automatically upon the final termination date, the Menominee Reservation so far as hunting and fishing is concerned, would become subject to the laws of Wisconsin." Joint Hearings on S. 2813, H. R. 2828, and H. R. 7135, Subcommittees of Committees on Interior and Insular Affairs, 83d Cong., 2d Sess., Pt. 6, pp. 692, 708.

aries.[6] Several exceptions to the general grant were enumerated, including an exception from the grant of criminal jurisdiction for treaty-based hunting and fishing rights. 18 U. S. C. § 1162 (b). But this case does not deal with state jurisdiction over Indian country; it deals with state jurisdiction over Indians after Indian country has been terminated. Whereas Public Law 280 provides for the continuation of the special hunting and fishing rights while a reservation exists, the Termination Act provides for the applicability of all state laws without exception after the reservation has disappeared.[7]

The Termination Act by its very terms provides:

> "[A]ll statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe . . . ." 25 U. S. C. § 899.

Public Law 280 is such a statute. It has no application to the Menominees now that their reservation is gone.[8]

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[6] "Indian country" is defined in 18 U. S. C. § 1151 as land within Indian reservations, dependent Indian communities, and Indian allotments.

Public Law 280 as originally enacted in 1953, 67 Stat. 588, did not include the Menominee reservation. In 1954 the statute was amended to include that reservation. 68 Stat. 795. From that time until the reservation was terminated in 1961, Public Law 280 governed the extent to which the State could assert jurisdiction over the Menominees on their reservation.

[7] The only real relevance of Public Law 280 lies in its demonstration that when Congress wants to except treaty rights from jurisdictional grants, it knows how to do so. Cf. Klamath Termination Act, 68 Stat. 718, 25 U. S. C. § 564 *et seq.*, enacted by the same Congress that enacted the Menominee Termination Act, which explicitly preserves fishing rights. 25 U. S. C. § 564m (b).

[8] If, as the Court seems to say, the exceptions enumerated in Public Law 280 continue in effect after termination of Indian country, it follows that Wisconsin cannot now tax, or otherwise regulate the use of, property owned by the Menominees. 18 U. S. C. § 1162 (b); 28 U. S. C. § 1360 (b). Cf. *Snohomish County* v. *Seattle*

The 1854 Treaty granted the Menominees special hunting and fishing rights. The 1954 Termination Act, by subjecting the Menominees without exception to state law, took away those rights. The Menominees are entitled to compensation.

I would reverse the judgment of the Court of Claims.

Disposal Co., 70 Wash. 2d 668, 425 P. 2d 22, holding that Public Law 280 prohibits zoning regulation of a garbage dump on reservation land leased to non-Indians. Certiorari was denied, 389 U. S. 1016, MR. JUSTICE DOUGLAS, joined by MR. JUSTICE WHITE, dissenting.

NATIONAL LABOR RELATIONS BOARD *v.* INDUSTRIAL UNION OF MARINE & SHIPBUILDING WORKERS OF AMERICA, AFL–CIO, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 796. Argued April 30, 1968.—Decided May 27, 1968.

Holder, a member of respondent unions, submitted charges to Local 22 that its president had violated the International's constitution. The local decided in its president's favor. Holder, without pursuing the intra-union appeals procedure contained in § 5 of the International's constitution, filed with the NLRB an unfair labor practice complaint claiming violation of § 8 (b) (1) (A) of the National Labor Relations Act based on the same alleged violations of the president and charging that Local 22 had caused his employer to discriminate against him because he had engaged in "protected activity" with respect to his employment. While Holder's complaint was pending before the NLRB, Local 22 brought intra-union charges that Holder had violated § 5 of the International's constitution by filing the charge with the NLRB before exhausting his internal remedies, held a hearing, found Holder guilty, and expelled him from respondent unions. Holder then filed a second charge with the NLRB (the basis of this case), which found that respondent unions had violated § 8 (b) (1) (A) by expelling Holder for filing the charge with the NLRB without having first exhausted intra-union procedures. The NLRB issued a remedial order. The Court of Appeals refused to enforce that order, relying on § 101 (a) (4) of the Labor-Management Reporting and Disclosure Act of 1959, which, while prohibiting a union from limiting a member's right to resort to a tribunal, provides that a member "may be required to exhaust reasonable hearing procedures" before doing so, "not to exceed a four-month lapse of time." *Held:*

1. Holder's charge that he was discriminated against because he had engaged "in certain protected activity" constituted a sufficient allegation of impairment of § 7 rights. Pp. 421–422.

2. Where a union member's complaint of grievance does not concern an internal union matter, but as in this case touches a

part of the public domain covered by the National Labor Relations Act, failure to resort to any intra-union grievance procedure before filing an unfair labor practice complaint with the NLRB is not ground for expulsion from the union. Pp. 422–425, 428.

3. Though § 101 (a)(4) of the Labor-Management Reporting and Disclosure Act authorizes union hearing procedures for processing members' grievances, provided those procedures do not consume more than four months, a court or agency may consider whether a particular procedure is "reasonable" and entertain the complaint even though those procedures have not been "exhausted." Pp. 425–428.

379 F. 2d 702, reversed.

Norton J. Come argued the cause for petitioner. With him on the brief were *Solicitor General Griswold, Arnold Ordman,* and *Dominick L. Manoli.*

M. H. Goldstein argued the cause and filed a brief for respondents.

Kenneth C. McGuiness and *Stanley R. Strauss* filed a brief for Price, as *amicus curiae,* urging reversal.

J. Albert Woll, Laurence Gold, and *Thomas E. Harris* filed a brief for the American Federation of Labor and Congress of Industrial Organizations, as *amicus curiae,* urging affirmance.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

One Holder, a member of respondent unions, filed with the National Labor Relations Board an unfair labor practice charge, alleging that Local 22 had violated § 8 (b)(1)(A) of the National Labor Relations Act,[1] 61

[1] Section 8 (b) provides in part: "It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own

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Stat. 141, 29 U. S. C. § 158 (b)(1)(A), by causing his employer to discriminate against him because he had engaged in protected activity with respect to his employment.[2] The filing of this charge followed an accusation by Holder to Local 22 that its president had violated the constitution of the International. The local decided in favor of its president; but Holder did not pursue the intra-union appeals procedure that was available to him and filed the unfair labor practice charge instead, based on the same alleged violations by the president.

Section 5 of Article V of the constitution of the International Union, which was binding on Local 22, contained the following provision relative to grievances of union members:

> "Every member . . . considering himself . . . aggrieved by any action of this Union, the [General

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rules with respect to the acquisition or retention of membership therein . . . ."

Section 7, 61 Stat. 140, 29 U. S. C. § 157, contains the following guarantee of rights: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3)."

[2] This charge, filed with the Board February 28, 1964, was directed solely against respondent International Union and alleged that:

"On or about October 8, 196[3], the above named labor organization caused the United States Lines [employer] to discriminate against Edwin D. Holder because he engaged in concerted activities with respect to the conditions of his employment.

"By these and other acts, the above named labor organization has interfered with, restrained and coerced, and continues to interfere with, restrain and coerce the Company's employees in the exercise of rights guaranteed in Section 7 of the Act."

By letter of May 20, 1964, the Regional Director informed Holder that this charge was dismissed.

> Executive Board], a National Officer, a Local or other subdivision of this Union shall exhaust all remedies and appeals within the Union, provided by this Constitution, before he shall resort to any court or other tribunal outside of the Union."

While Holder's charge was pending before the Board, Local 22 lodged a complaint in internal union proceedings against Holder alleging he had violated § 5 of Article V of the International's constitution by filing his charge with the Board before he had exhausted his internal remedies. After a hearing before Local 22, Holder was found guilty and expelled from both respondent unions. He then appealed to the General Executive Board of the International which affirmed the local's action on October 7, 1964.

On October 28, 1964, Holder filed a second charge with the Board, claiming his expulsion for filing the first charge was unlawful. That charge is the basis of the instant case.

A complaint issued; and the Board found that the respondent unions had violated § 8 (b)(1)(A) of the Act by expelling Holder for filing a charge with the Board without first having exhausted the intra-union procedures. 159 N. L. R. B. 1065. It issued a remedial order, which the Court of Appeals refused to enforce. 379 F. 2d 702. The case is here on writ of certiorari. 389 U. S. 1034.

The important question is whether consistent with the applicable federal statutes a union may penalize one of its members for seeking the aid of the Board without exhausting all internal union remedies. There is a threshold question, however, concerning the adequacy of Holder's first or original charge to the Board against respondents. Holder charged discrimination practiced against him because, to use the words of the Regional Director as he paraphrased the charge in the complaint,

Holder had engaged "in certain protected activity" of an unspecified nature "with respect to his employment." It is pointed out that § 8 (b)(1)(A) protects only "the exercise of rights guaranteed by section 7";[3] and that § 7 "says nothing about any right to file charges with the Board." 379 F. 2d, at 706. That, however, is not the issue. The charge by Holder that he was discriminated against because he had engaged "in certain protected activity" was a sufficent way to allege an impairment of § 7 rights. "The charge is not proof. It merely sets in motion the machinery of an inquiry." *NLRB* v. *Indiana & Michigan Electric Co.*, 318 U. S. 9, 18. Moreover, no issue was raised before the Board concerning the nature of the "protected activity." The answer of respondents insofar as the original charge is concerned said only that the charge made by Holder to the Board was based upon precisely the same facts as those on which his internal union charges against the president of the Local had been based. We must, therefore, assume that the initial charge was one within the ambit of § 7 and so plainly within it that no party undertook to question it.

The main issue in the case is whether Holder could be expelled for filing the charge with the Board without first having exhausted "all remedies and appeals within the Union"[4] as provided in § 5 of Article V of the constitution, already quoted.

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[3] N. 1, *supra*.

[4] These remedies are provided for in § 3 of Article V of the constitution:

"No Union member in good standing in any Local may be suspended or expelled or otherwise disciplined or penalized without a fair and open trial, of which reasonable notice shall be given the accused member, before the Trial Board of the Local Union . . . . The accused member or members or the accusers may appeal the decision of the local Union's Executive Board to the regular meeting of the General Membership of the Local Union next follow-

Section 8 (b)(1)(A) in its proviso [5] preserves to a union "the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein."

The Court of Appeals concluded that while this proviso would not permit a union to expel a member because he filed an unfair labor practice charge against the union, it permits a rule which gives the union "a fair opportunity to correct its own wrong before the injured member should have recourse to the Board." 379 F. 2d, at 707.

We held in *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U. S. 175, that § 8 (b)(1)(A) does not prevent a union from imposing fines on members who cross a picket line created to implement an authorized strike. The strike, we said, "is the ultimate weapon in labor's arsenal for achieving agreement upon its terms" and the power to fine or expel a strikebreaker " 'is essential if the union is to be an effective bargaining agent.' " *Id.*, at 181.

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ing the meeting of the Executive Board at which the decision was rendered, and within thirty (30) days after the membership's decision may appeal to the General Executive Board. The General Executive Board shall, after reasonable notice to the appellant of the time and place of hearing, hold a fair and open hearing on such appeal and, not later than 130 days after the first regular meeting of the General Executive Board following receipt of the appeal at the National Office, and in any event not later than the first day of the National Convention, shall render its decision affirming, overruling, or modifying either the findings of guilt or innocence, or the penalty imposed. Both the accused and the accuser shall have the right to file an appeal to the next National Convention by sending such appeal to the National Office of this Union by registered mail not later than thirty days after the decision by the General Executive Board."

Although Holder did not take any internal appeal from the local's original adverse decision on his charge to it against the president, he did appeal his expulsion to the General Executive Board of the International, which affirmed.

[5] N. 1, *supra*.

Thus § 8 (b)(1)(A) assures a union freedom of self-regulation where its legitimate internal affairs are concerned. But where a union rule penalizes a member for filing an unfair labor practice charge with the Board, other considerations of public policy come into play.

Section 10 (b) of the Act, 61 Stat. 146, 29 U. S. C. § 160 (b), forbids issuance of a complaint based on conduct occurring more than six months prior to filing of the charge—a provision promoting promptness. A proceeding by the Board is not to adjudicate private rights but to effectuate a public policy. The Board cannot initiate its own proceedings; implementation of the Act is dependent "upon the initiative of individual persons." *Nash* v. *Florida Industrial Comm'n,* 389 U. S. 235, 238. The policy of keeping people "completely free from coercion," *ibid.,* against making complaints to the Board is therefore important in the functioning of the Act as an organic whole. A restriction such as we find in § 5 of Article V of the International's constitution is contrary to that policy, as it is applied here. A healthy interplay of the forces governed and protected by the Act means that there should be as great a freedom to ask the Board for relief as there is to petition any other department of government for a redress of grievances.[6] Any coercion used to discourage, retard, or defeat that access is beyond the legitimate interests of a labor organization. That was the philosophy of the Board in the *Skura* case, *Local 138, International Union of Operating Engineers,* 148 N. L. R. B. 679; and we agree that the overriding public interest makes unimpeded access to the Board the only healthy alternative, except and unless plainly internal affairs of the union are involved.

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[6] See Cox, Internal Affairs of Labor Unions under the Labor Reform Act of 1959, 58 Mich. L. Rev. 819, 839 (1960); Summers, Legal Limitations in Union Discipline, 64 Harv. L. Rev. 1049, 1067–1068 (1951); Summers, The Usefulness of Law in Achieving Union Democracy, 48 Am. Econ. Rev. 44, 47 (May 1958).

In the present case a whole complex of public policy issues was raised by Holder's original charge. It implicated not only the union but the employer. The employer might also have been made a party and comprehensive and coordinated remedies provided. Those issues cannot be fully explored in an internal union proceeding. There cannot be any justification to make the public processes wait until the union member exhausts internal procedures plainly inadequate to deal with all phases of the complex problem concerning employer, union, and employee member. If the member becomes exhausted, instead of the remedies, the issues of public policy are never reached and an airing of the grievance never had. The Court of Appeals recognized that this might be the consequence and said that resort to an intra-union remedy would not be required if it "would impose unreasonable delay or hardship upon the complainant." 379 F. 2d, at 707.

The difficulty is that a member would have to guess what a court ultimately would hold. If he guessed wrong and filed the charge with the Board without exhausting internal union procedures, he would have no recourse against the discipline of the union. That risk alone is likely to chill the exercise of a member's right to a Board remedy and induce him to forgo his grievance or pursue a futile union procedure. That is the judgment of the Board; and we think it comports with the policy of the Act. That is to say, the proviso in § 8 (b)(1)(A) that unions may design their own rules respecting "the acquisition or retention of membership" is not so broad as to give the union power to penalize a member who invokes the protection of the Act for a matter that is in the public domain and beyond the internal affairs of the union.

The Court of Appeals found support for its contrary position in § 101 (a)(4) of the Labor-Management Re-

porting and Disclosure Act of 1959.[7] 73 Stat. 522, 29 U. S. C. § 411 (a)(4). While that provision prohibits a union from limiting the right of a member to institute an action in any court or in a proceeding before any administrative agency, it provides that a member "may be required to exhaust reasonable hearing procedures" "not to exceed a four-month lapse of time."

We conclude that "may be required" is not a grant of authority to unions more firmly to police their members but a statement of policy that the public tribunals whose aid is invoked may in their discretion stay their hands for four months, while the aggrieved person seeks relief within the union. We read it, in other words, as installing in this labor field a regime comparable to that which prevails in other areas of law before the federal courts, which often stay their hands while a litigant seeks administrative relief before the appropriate agency.[8]

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[7] Section 101 (a)(4) provides: "No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency . . . or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: *Provided*, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings . . . ."

[8] See *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41; compare *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496. The requirement of exhaustion is a matter within the sound discretion of the courts. See, *e. g.*, *McCulloch* v. *Sociedad Nacional*, 372 U. S. 10, 16–17. And see *Leedom* v. *Kyne*, 358 U. S. 184, 188–189; *California Comm'n* v. *United States*, 355 U. S. 534, 539–540. Exhaustion is not required when the administrative remedies are inadequate. *Greene* v. *United States*, 376 U. S. 149; *McNeese* v. *Board of Education*, 373 U. S. 668. See generally 3 K. Davis, Administrative Law Treatise § 20.07 (1958). When the complaint, as in the instant case, raises a matter that is in the public domain and beyond the internal affairs of the union, the union's internal procedures are, as previously explained, plainly inadequate.

The legislative history is not very illuminating. Some members of the House who spoke indicated that there was room for judicial discretion whether to remit the member to available internal union remedies.[9] In the Senate the fear was expressed that the new section would give unions power to punish their members for filing charges with the Board prior to exhaustion of their internal remedies.[10] In the Senate the continuance of union grievance procedures under the new section was emphasized.[11] It was indeed expressly stated by Senator John F. Kennedy reporting from the Conference Committee: [12]

> "The 4-month limitation in the House bill also relates to restrictions imposed by unions rather than the rules of judicial administration or the action of Government agencies."

Yet it plainly appears from those speaking for the Conference Report that a member was to be permitted to complain to the Board even before the end of the four-month period. Congressman Griffin reported: [13]

> "[T]he proviso was not intended to limit in any way the right of a union member under the Labor-Management Relations Act of 1947, as amended, to file unfair labor practice charges against a union, or the right of the NLRB to entertain such charges, even though a 4-month period may not have elapsed."

And on the Senate side, Senator Kennedy said that the proviso was not intended "to invalidate the consid-

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[9] 105 Cong. Rec. 15835 (McCormack); *id.*, at 15689–15690 (O'Hara); *id.*, at 15563 (Foley).

[10] 105 Cong. Rec. 10095 (Goldwater).

[11] 105 Cong. Rec. 17899 (John F. Kennedy).

[12] 105 Cong. Rec. 17899.

[13] 105 Cong. Rec. 18152.

erable body of State and Federal court decisions of many years standing which require, *or do not require,* the exhaustion of internal remedies prior to court intervention *depending upon the reasonableness of such requirements in terms of the facts and circumstances of a particular case.*" (Emphasis added.) Nor, he said, was it intended to prohibit "the National Labor Relations Board . . . from entertaining charges by a member against a labor organization even though 4 months has not elapsed." [14]

We conclude that unions were authorized to have hearing procedures for processing grievances of members, provided those procedures did not consume more than four months of time; but that a court or agency might consider whether a particular procedure was "reasonable" and entertain the complaint even though those procedures had not been "exhausted." We also conclude, for reasons stated earlier in this opinion, that where the complaint or grievance does not concern an internal union matter, but touches a part of the public domain covered by the Act, failure to resort to any intra-union grievance procedure is not ground for expulsion from a union. We hold that the Board properly entertained the complaint of Holder and that its order should be enforced.

Reversed.

MR. JUSTICE STEWART dissents. He would affirm the judgment, agreeing substantially with the opinion of the Court of Appeals for the Third Circuit. 379 F. 2d 702.

MR. JUSTICE HARLAN, concurring.

I am persuaded by the legislative history, summarized in part by the Court, that the proviso to § 101 (a)(4) of the Labor-Management Reporting and Disclosure Act,

[14] 105 Cong. Rec. 17899.

29 U. S. C. § 411 (a)(4), was intended simply to permit a court or agency to require a union member to exhaust internal union remedies of less than four months' duration before invoking outside assistance. See generally *Detroy* v. *American Guild of Variety Artists*, 286 F. 2d 75, 78. I cannot, however, agree that a union may punish a member for his invocation of his remedies before a court or agency "where the complaint or grievance . . . concern[s] an internal union matter," and thus does not touch any "part of the public domain covered by the Act . . . ." *Ante*, at 428. Assuming *arguendo* that there are member-union grievances untouched by the various federal labor statutes, this dichotomy has, it seems to me, precisely the disadvantage that the Court has found in the Third Circuit's construction of the proviso: it compels a member to gamble his union membership, and often his employment, on the accuracy of his understanding of the federal labor laws.

Finally, it is appropriate to emphasize that courts and agencies will frustrate an important purpose of the 1959 legislation if they do not, in fact, regularly compel union members "to exhaust reasonable hearing procedures" within the union organization. Responsible union self-government demands, among other prerequisites, a fair opportunity to function.* See *Detroy* v. *American Guild of Variety Artists*, *supra*, at 79.

With these modifications, I concur in the opinion and judgment of the Court.

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*It should be noted that many union constitutions have elaborate provisions for internal appeals, and that these provisions were often added or modified as a consequence of § 101 (a)(4). See Kroner, Title I of the LMRDA: Some Problems of Legal Method and Mythology, 43 N. Y. U. L. Rev. 280, 302, n. 72.

GREEN ET AL. *v.* COUNTY SCHOOL BOARD OF NEW KENT COUNTY ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 695. Argued April 3, 1968.—Decided May 27, 1968.

Respondent School Board maintains two schools, one on the east side and one on the west side of New Kent County, Virginia. About one-half of the county's population are Negroes, who reside throughout the county since there is no residential segregation. Although this Court held in *Brown* v. *Board of Education*, 347 U. S. 483 (*Brown I*), that Virginia's constitutional and statutory provisions requiring racial segregation in schools were unconstitutional, the Board continued segregated operation of the schools, presumably pursuant to Virginia statutes enacted to resist that decision. In 1965, after this suit for injunctive relief against maintenance of allegedly segregated schools was filed, the Board, in order to remain eligible for federal financial aid, adopted a "freedom-of-choice" plan for desegregating the schools. The plan permits students, except those entering the first and eighth grades, to choose annually between the schools; those not choosing are assigned to the school previously attended; first and eighth graders must affirmatively choose a school. The District Court approved the plan, as amended, and the Court of Appeals approved the "freedom-of-choice" provisions although it remanded for a more specific and comprehensive order concerning teachers. During the plan's three years of operation no white student has chosen to attend the all-Negro school, and although 115 Negro pupils enrolled in the formerly all-white school, 85% of the Negro students in the system still attend the all-Negro school. *Held:*

1. In 1955 this Court, in *Brown* v. *Board of Education*, 349 U. S. 294 (*Brown II*), ordered school boards operating dual school systems, part "white" and part "Negro," to "effectuate a transition to a racially nondiscriminatory school system," and it is in light of that command that the effectiveness of the "freedom-of-choice" plan to achieve that end is to be measured. Pp. 435–438.

2. The burden is on a school board to provide a plan that promises realistically to work *now*, and a plan that at this late date fails to provide meaningful assurance of prompt and effective disestablishment of a dual system is intolerable. Pp. 438–439.

3. A district court's obligation is to assess the effectiveness of the plan in light of the facts at hand and any alternatives which may be feasible and more promising, and to retain jurisdiction until it is clear that state-imposed segregation has been completely removed. P. 439.

4. Where a "freedom-of-choice" plan offers real promise of achieving a unitary, nonracial system there might be no objection to allowing it to prove itself in operation, but where there are reasonably available other ways, such as zoning, promising speedier and more effective conversion to a unitary school system, "freedom of choice" is not acceptable. Pp. 439–441.

5. The New Kent "freedom-of-choice" plan is not acceptable; it has not dismantled the dual system, but has operated simply to burden students and their parents with a responsibility which *Brown II* placed squarely on the School Board. Pp. 441–442.

382 F. 2d 338, vacated in part and remanded.

Samuel W. Tucker and *Jack Greenberg* argued the cause for petitioners. With them on the brief were *James M. Nabrit III*, *Henry L. Marsh III*, and *Michael Meltsner*.

Frederick T. Gray argued the cause for respondents. With him on the brief were *Robert Y. Button*, Attorney General of Virginia, *Robert D. McIlwaine III*, First Assistant Attorney General, and *Walter E. Rogers*.

Louis F. Claiborne argued the cause for the United States, as *amicus curiae*. With him on the brief were *Solicitor General Griswold*, *Assistant Attorney General Pollak*, *Lawrence G. Wallace*, and *Brian K. Landsberg*.

Joseph B. Robison filed a brief for the American Jewish Congress, as *amicus curiae*, urging reversal.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question for decision is whether, under all the circumstances here, respondent School Board's adoption of a "freedom-of-choice" plan which allows a pupil to choose

his own public school constitutes adequate compliance with the Board's responsibility "to achieve a system of determining admission to the public schools on a nonracial basis . . . ." *Brown* v. *Board of Education,* 349 U. S. 294, 300–301 (*Brown II*).

Petitioners brought this action in March 1965 seeking injunctive relief against respondent's continued maintenance of an alleged racially segregated school system. New Kent County is a rural county in Eastern Virginia. About one-half of its population of some 4,500 are Negroes. There is no residential segregation in the county; persons of both races reside throughout. The school system has only two schools, the New Kent school on the east side of the county and the George W. Watkins school on the west side. In a memorandum filed May 17, 1966, the District Court found that the "school system serves approximately 1,300 pupils, of which 740 are Negro and 550 are White. The School Board operates one white combined elementary and high school [New Kent], and one Negro combined elementary and high school [George W. Watkins]. There are no attendance zones. Each school serves the entire county." The record indicates that 21 school buses—11 serving the Watkins school and 10 serving the New Kent school—travel overlapping routes throughout the county to transport pupils to and from the two schools.

The segregated system was initially established and maintained under the compulsion of Virginia constitutional and statutory provisions mandating racial segregation in public education, Va. Const., Art. IX, § 140 (1902); Va. Code § 22–221 (1950). These provisions were held to violate the Federal Constitution in *Davis* v. *County School Board of Prince Edward County,* decided with *Brown* v. *Board of Education,* 347 U. S. 483, 487 (*Brown I*). The respondent School Board continued the segregated operation of the system after the *Brown*

decisions, presumably on the authority of several statutes enacted by Virginia in resistance to those decisions. Some of these statutes were held to be unconstitutional on their face or as applied.[1] One statute, the Pupil Placement Act, Va. Code § 22–232.1 *et seq.* (1964), not repealed until 1966, divested local boards of authority to assign children to particular schools and placed that authority in a State Pupil Placement Board. Under that Act children were each year automatically reassigned to the school previously attended unless upon their application the State Board assigned them to another school; students seeking enrollment for the first time were also assigned at the discretion of the State Board. To September 1964, no Negro pupil had applied for admission to the New Kent school under this statute and no white pupil had applied for admission to the Watkins school.

The School Board initially sought dismissal of this suit on the ground that petitioners had failed to apply to the State Board for assignment to New Kent school. However on August 2, 1965, five months after the suit was brought, respondent School Board, in order to remain eligible for federal financial aid, adopted a "freedom-of-choice" plan for desegregating the schools.[2] Under that

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[1] *E. g., Griffin* v. *County School Board of Prince Edward County,* 377 U. S. 218; *Green* v. *School Board of City of Roanoke,* 304 F. 2d 118 (C. A. 4th Cir. 1962); *Adkins* v. *School Board of City of Newport News,* 148 F. Supp. 430 (D. C. E. D. Va.), aff'd, 246 F. 2d 325 (C. A. 4th Cir. 1957); *James* v. *Almond,* 170 F. Supp. 331 (D. C. E. D. Va. 1959); *Harrison* v. *Day,* 200 Va. 439, 106 S. E. 2d 636 (1959).

[2] Congress, concerned with the lack of progress in school desegregation, included provisions in the Civil Rights Act of 1964 to deal with the problem through various agencies of the Federal Government. 78 Stat. 246, 252, 266, 42 U. S. C. §§ 2000c *et seq.,* 2000d *et seq.,* 2000h–2. In Title VI Congress declared that

"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied

plan, each pupil, except those entering the first and eighth grades, may annually choose between the New Kent and Watkins schools and pupils not making a choice are assigned to the school previously attended; first and eighth grade pupils must affirmatively choose a school. After the plan was filed the District Court denied petitioners' prayer for an injunction and granted respondent leave to submit an amendment to the plan with respect to employment and assignment of teachers and staff on a racially nondiscriminatory basis. The amendment was duly filed and on June 28, 1966, the District Court approved the "freedom-of-choice" plan as so amended. The Court of Appeals for the Fourth Circuit, *en banc*, 382 F. 2d 338,[3] affirmed the District Court's approval of the "freedom-of-choice" provisions of the plan but remanded the case to the District Court for entry of an order regarding faculty

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the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U. S. C. § 2000d.

The Department of Health, Education, and Welfare issued regulations covering racial discrimination in federally aided school systems, as directed by 42 U. S. C. § 2000d–1, and in a statement of policies, or "guidelines," the Department's Office of Education established standards according to which school systems in the process of desegregation can remain qualified for federal funds. 45 CFR §§ 80.1–80.13, 181.1–181.76 (1967). "Freedom-of-choice" plans are among those considered acceptable, so long as in operation such a plan proves effective. 45 CFR § 181.54. The regulations provide that a school system "subject to a final order of a court of the United States for the desegregation of such school . . . system" with which the system agrees to comply is deemed to be in compliance with the statute and regulations. 45 CFR § 80.4 (c). See also 45 CFR § 181.6. See generally Dunn, Title VI, the Guidelines and School Desegregation in the South, 53 Va. L. Rev. 42 (1967); Note, 55 Geo. L. J. 325 (1966); Comment, 77 Yale L. J. 321 (1967).

[3] This case was decided *per curiam* on the basis of the opinion in *Bowman* v. *County School Board of Charles City County*, 382 F. 2d 326, decided the same day. Certiorari has not been sought for the *Bowman* case itself.

"which is much more specific and more comprehensive" and which would incorporate in addition to a "minimal, objective time table" some of the faculty provisions of the decree entered by the Court of Appeals for the Fifth Circuit in *United States* v. *Jefferson County Board of Education*, 372 F. 2d 836, aff'd *en banc*, 380 F. 2d 385 (1967). Judges Sobeloff and Winter concurred with the remand on the teacher issue but otherwise disagreed, expressing the view "that the District Court should be directed . . . also to set up procedures for periodically evaluating the effectiveness of the [Board's] 'freedom of choice' [plan] in the elimination of other features of a segregated school system." *Bowman* v. *County School Board of Charles City County*, 382 F. 2d 326, at 330. We granted certiorari, 389 U. S. 1003.

The pattern of separate "white" and "Negro" schools in the New Kent County school system established under compulsion of state laws is precisely the pattern of segregation to which *Brown I* and *Brown II* were particularly addressed, and which *Brown I* declared unconstitutionally denied Negro school children equal protection of the laws. Racial identification of the system's schools was complete, extending not just to the composition of student bodies at the two schools but to every facet of school operations—faculty, staff, transportation, extracurricular activities and facilities. In short, the State, acting through the local school board and school officials, organized and operated a dual system, part "white" and part "Negro."

It was such dual systems that 14 years ago *Brown I* held unconstitutional and a year later *Brown II* held must be abolished; school boards operating such school systems were *required* by *Brown II* "to effectuate a transition to a racially nondiscriminatory school system." 349 U. S., at 301. It is of course true that for the time immediately after *Brown II* the concern was with making an initial break in a long-established pattern of excluding

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Negro children from schools attended by white children. The principal focus was on obtaining for those Negro children courageous enough to break with tradition a place in the "white" schools. See, *e. g., Cooper* v. *Aaron,* 358 U. S. 1. Under *Brown II* that immediate goal was only the first step, however. The transition to a unitary, nonracial system of public education was and is the ultimate end to be brought about; it was because of the "complexities arising from the transition to a system of public education freed of racial discrimination" that we provided for "all deliberate speed" in the implementation of the principles of *Brown I.* 349 U. S., at 299–301. Thus we recognized the task would necessarily involve solution of "varied local school problems." *Id.,* at 299. In referring to the "personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis," we also noted that "[t]o effectuate this interest may call for elimination of a variety of obstacles in making the transition . . . ." *Id.,* at 300. Yet we emphasized that the constitutional rights of Negro children required school officials to bear the burden of establishing that additional time to carry out the ruling in an effective manner "is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date." *Ibid.* We charged the district courts in their review of particular situations to

> "consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the

> defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system." *Id.*, at 300–301.

It is against this background that 13 years after *Brown II* commanded the abolition of dual systems we must measure the effectiveness of respondent School Board's "freedom-of-choice" plan to achieve that end. The School Board contends that it has fully discharged its obligation by adopting a plan by which every student, regardless of race, may "freely" choose the school he will attend. The Board attempts to cast the issue in its broadest form by arguing that its "freedom-of-choice" plan may be faulted only by reading the Fourteenth Amendment as universally requiring "compulsory integration," a reading it insists the wording of the Amendment will not support. But that argument ignores the thrust of *Brown II*. In the light of the command of that case, what is involved here is the question whether the Board has achieved the "racially nondiscriminatory school system" *Brown II* held must be effectuated in order to remedy the established unconstitutional deficiencies of its segregated system. In the context of the state-imposed segregated pattern of long standing, the fact that in 1965 the Board opened the doors of the former "white" school to Negro children and of the "Negro" school to white children merely begins, not ends, our inquiry whether the Board has taken steps adequate to abolish its dual, segregated system. *Brown II* was a call for the dismantling of well-entrenched dual systems tempered by an awareness that complex and multifaceted problems would arise which would require time and flexibility for a successful resolution. School boards such as the respondent then operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to

convert to a unitary system in which racial discrimination would be eliminated root and branch. See *Cooper* v. *Aaron, supra,* at 7; *Bradley* v. *School Board,* 382 U. S. 103; cf. *Watson* v. *City of Memphis,* 373 U. S. 526. The constitutional rights of Negro school children articulated in *Brown I* permit no less than this; and it was to this end that *Brown II* commanded school boards to bend their efforts.[4]

In determining whether respondent School Board met that command by adopting its "freedom-of-choice" plan, it is relevant that this first step did not come until some 11 years after *Brown I* was decided and 10 years after *Brown II* directed the making of a "prompt and reasonable start." This deliberate perpetuation of the unconstitutional dual system can only have compounded the harm of such a system. Such delays are no longer tolerable, for "the governing constitutional principles no longer bear the imprint of newly enunciated doctrine." *Watson* v. *City of Memphis, supra,* at 529; see *Bradley* v. *School Board, supra; Rogers* v. *Paul,* 382 U. S. 198. Moreover, a plan that at this late date fails to provide meaningful assurance of prompt and effective disestablishment of a dual system is also intolerable. "The time for mere 'deliberate speed' has run out," *Griffin* v. *County School Board,* 377 U. S. 218, 234; "the context in which we must interpret and apply this language [of *Brown II*] to plans for desegregation has been significantly altered."

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[4] "We bear in mind that the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana* v. *United States,* 380 U. S. 145, 154. Compare the remedies discussed in, *e. g., NLRB* v. *Newport News Shipbuilding & Dry Dock Co.,* 308 U. S. 241; *United States* v. *Crescent Amusement Co.,* 323 U. S. 173; *Standard Oil Co.* v. *United States,* 221 U. S. 1. See also *Griffin* v. *County School Board,* 377 U. S. 218, 232–234.

Goss v. *Board of Education*, 373 U. S. 683, 689. See *Calhoun* v. *Latimer*, 377 U. S. 263. The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*.

The obligation of the district courts, as it always has been, is to assess the effectiveness of a proposed plan in achieving desegregation. There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance. It is incumbent upon the school board to establish that its proposed plan promises meaningful and immediate progress toward disestablishing state-imposed segregation. It is incumbent upon the district court to weigh that claim in light of the facts at hand and in light of any alternatives which may be shown as feasible and more promising in their effectiveness. Where the court finds the board to be acting in good faith and the proposed plan to have real prospects for dismantling the state-imposed dual system "at the earliest practicable date," then the plan may be said to provide effective relief. Of course, the availability to the board of other more promising courses of action may indicate a lack of good faith; and at the least it places a heavy burden upon the board to explain its preference for an apparently less effective method. Moreover, whatever plan is adopted will require evaluation in practice, and the court should retain jurisdiction until it is clear that state-imposed segregation has been completely removed. See No. 805, *Raney* v. *Board of Education, post*, at 449.

We do not hold that "freedom of choice" can have no place in such a plan. We do not hold that a "freedom-of-choice" plan might of itself be unconstitutional, although that argument has been urged upon us. Rather,

all we decide today is that in desegregating a dual system a plan utilizing "freedom of choice" is not an end in itself. As Judge Sobeloff has put it,

> "'Freedom of choice' is not a sacred talisman; it is only a means to a constitutionally required end—the abolition of the system of segregation and its effects. If the means prove effective, it is acceptable, but if it fails to undo segregation, other means must be used to achieve this end. The school officials have the continuing duty to take whatever action may be necessary to create a 'unitary, nonracial system.'" *Bowman* v. *County School Board*, 382 F. 2d 326, 333 (C. A. 4th Cir. 1967) (concurring opinion).

Accord, *Kemp* v. *Beasley*, 389 F. 2d 178 (C. A. 8th Cir. 1968); *United States* v. *Jefferson County Board of Education*, *supra*. Although the general experience under "freedom of choice" to date has been such as to indicate its ineffectiveness as a tool of desegregation,[5] there may well be instances in which it can serve as an effective device. Where it offers real promise of aiding a deseg-

[5] The views of the United States Commission on Civil Rights, which we neither adopt nor refuse to adopt, are as follows:

"Freedom of choice plans, which have tended to perpetuate racially identifiable schools in the Southern and border States, require affirmative action by both Negro and white parents and pupils before such disestablishment can be achieved. There are a number of factors which have prevented such affirmative action by substantial numbers of parents and pupils of both races:

"(a) Fear of retaliation and hostility from the white community continue to deter many Negro families from choosing formerly all-white schools;

"(b) During the past school year [1966–1967], as in the previous year, in some areas of the South, Negro families with children attending previously all-white schools under free choice plans were targets of violence, threats of violence and economic reprisal by white persons and Negro children were subjected to harassment by white

regation program to effectuate conversion of a state-imposed dual system to a unitary, nonracial system there might be no objection to allowing such a device to prove itself in operation. On the other hand, if there are reasonably available other ways, such for illustration as zoning, promising speedier and more effective conversion to a unitary, nonracial school system, "freedom of choice" must be held unacceptable.

The New Kent School Board's "freedom-of-choice" plan cannot be accepted as a sufficient step to "effectuate a transition" to a unitary system. In three years of operation not a single white child has chosen to attend Watkins school and although 115 Negro children enrolled in New Kent school in 1967 (up from 35 in 1965 and 111 in 1966) 85% of the Negro children in the system still attend the all-Negro Watkins school. In other words, the school system remains a dual system. Rather than further the dismantling of the dual system, the plan has operated simply to burden children and their parents

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classmates notwithstanding conscientious efforts by many teachers and principals to prevent such misconduct;

"(c) During the past school year, in some areas of the South public officials improperly influenced Negro families to keep their children in Negro schools and excluded Negro children attending formerly all-white schools from official functions;

"(d) Poverty deters many Negro families in the South from choosing formerly all-white schools. Some Negro parents are embarrassed to permit their children to attend such schools without suitable clothing. In some districts special fees are assessed for courses which are available only in the white schools;

"(e) Improvements in facilities and equipment . . . have been instituted in all-Negro schools in some school districts in a manner that tends to discourage Negroes from selecting white schools."

Southern School Desegregation, 1966–1967, at 88 (1967). See *id.*, at 45–69; Survey of School Desegregation in the Southern and Border States 1965–1966, at 30–44, 51–52 (U. S. Comm'n on Civil Rights 1966).

with a responsibility which *Brown II* placed squarely on the School Board. The Board must be required to formulate a new plan and, in light of other courses which appear open to the Board, such as zoning,[6] fashion steps which promise realistically to convert promptly to a system without a "white" school and a "Negro" school, but just schools.

The judgment of the Court of Appeals is vacated insofar as it affirmed the District Court and the case is remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

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[6] "In view of the situation found in New Kent County, where there is no residential segregation, the elimination of the dual school system and the establishment of a 'unitary, non-racial system' could be readily achieved with a minimum of administrative difficulty by means of geographic zoning—simply by assigning students living in the eastern half of the county to the New Kent School and those living in the western half of the county to the Watkins School. Although a geographical formula is not universally appropriate, it is evident that here the Board, by separately busing Negro children across the entire county to the 'Negro' school, and the white children to the 'white' school, is deliberately maintaining a segregated system which would vanish with non-racial geographic zoning. The conditions in this county present a classical case for this expedient." *Bowman* v. *County School Board, supra,* n. 3, at 332 (concurring opinion).

Petitioners have also suggested that the Board could consolidate the two schools, one site (*e. g.*, Watkins) serving grades 1–7 and the other (*e. g.*, New Kent) serving grades 8–12, this being the grade division respondent makes between elementary and secondary levels. Petitioners contend this would result in a more efficient system by eliminating costly duplication in this relatively small district while at the same time achieving immediate dismantling of the dual system.

These are two suggestions the District Court should take into account upon remand, along with any other proposed alternatives and in light of considerations respecting other aspects of the school system such as the matter of faculty and staff desegregation remanded to the court by the Court of Appeals.

Syllabus.

RANEY ET AL. *v.* BOARD OF EDUCATION OF THE GOULD SCHOOL DISTRICT ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 805. Argued April 3, 1968.—Decided May 27, 1968.

The Gould (Arkansas) School District, which has a population of about 60% Negroes, with no residential segregation, maintains two combination elementary and high schools located about ten blocks apart in the district's only major town. In the 1964–1965 school year the schools were totally segregated. As in *Green* v. *County School Board, ante,* p. 430, the School Board in 1965 adopted a "freedom-of-choice" plan in order to remain eligible for federal financial aid. The plan applies to all school grades and pupils are required to choose annually between the schools; those not choosing are assigned to the school previously attended. No white student has sought to enroll in the all-Negro Field Schools in three years, and although about 85 Negro students were enrolled in the formerly all-white Gould Schools in 1967, over 85% of the Negro pupils still attend the all-Negro Field Schools. In the first year under the plan applications for certain grades at the Gould Schools exceeded available space and applications of 28 Negroes were refused. This action was brought on behalf of some of them for injunctive relief against their being required to attend the Field Schools, the provision of inferior school facilities for Negroes, and respondents' "otherwise operating a racially segregated school system." During the pendency of the case plans were made to replace the high school building at Field Schools. Petitioners sought to enjoin that construction, contending that it should be built at the Gould site to avoid continued segregation. The District Court denied all relief and dismissed the complaint, ruling that since the "freedom-of-choice" plan was adopted without court compulsion, the plan was approved by the Department of Health, Education, and Welfare, and some Negroes had enrolled in the Gould Schools, the plan was not a pretense or a sham. The Court of Appeals affirmed the dismissal, suggesting that the issue of the adequacy of the plan or its implementation was not raised in the District Court. Since construction of the high school at the Field site was nearing completion, petitioners modified their position and urged the Court of Appeals to require conversion of the Gould Schools to a desegregated high school and the Field site to a

desegregated primary school. The Court of Appeals rejected this proposal since it was not presented to the trial court for consideration. *Held:*

1. Since the issue of the adequacy of the "freedom-of-choice" plan was before the District Court in the prayer of the complaint to enjoin respondents' "otherwise operating a racially segregated school system," and the District Court and the Court of Appeals considered the merits of the plan, the question of the adequacy of "freedom of choice" is properly before this Court. P. 447.

2. As in *Green* v. *County School Board, supra*, the school system remains a dual system and the plan is inadequate to convert it to a unitary, nonracial system. P. 447.

3. On remand petitioners may present their proposal for converting one school to a desegregated high school and the other to a desegregated primary school. P. 448.

4. The District Court's dismissal of the complaint was an improper exercise of discretion, and inconsistent with that court's responsibility under *Brown* v. *Board of Education*, 349 U. S. 294, to retain jurisdiction "to insure (1) that a constitutionally acceptable plan is adopted, and (2) that it is operated in a constitutionally permissible fashion so that the goal of a desegregated, nonracially operated school system is rapidly and finally achieved." *Kelley* v. *Altheimer*, 378 F. 2d 483, 489. P. 449.

381 F. 2d 252, reversed and remanded.

Jack Greenberg argued the cause for petitioners. With him on the brief were *James M. Nabrit III* and *Michael Meltsner.*

Robert V. Light argued the cause for respondents. With him on the brief was *Herschel H. Friday.*

Louis F. Claiborne argued the cause for the United States, as *amicus curiae.* With him on the brief were *Solicitor General Griswold, Assistant Attorney General Pollak, Lawrence G. Wallace,* and *Brian K. Landsberg.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This case presents the question of the adequacy of a "freedom-of-choice" plan as compliance with *Brown* v.

Board of Education, 349 U. S. 294 (*Brown II*), a question also considered today in No. 695, *Green* v. *County School Board of New Kent County, ante*, p. 430. The factual setting is very similar to that in *Green*.

This action was brought in September 1965 in the District Court for the Eastern District of Arkansas. Injunctive relief was sought against the continued maintenance by respondent Board of Education of an alleged racially segregated school system. The school district has an area of 80 square miles and a population of some 3,000, of whom 1,800 are Negroes and 1,200 are whites. Persons of both races reside throughout the county; there is no residential segregation. The school system consists of two combination elementary and high schools located about 10 blocks apart in Gould, the district's only major town. One combination, the Gould Schools, is almost all white and the other, the Field Schools, is all-Negro. In the 1964–1965 school year the schools were totally segregated; 580 Negro children attended the Field Schools and 300 white children attended the Gould Schools. Faculties and staffs were and are segregated. There are no attendance zones, each school complex providing any necessary bus transportation for its respective pupils.

The state-imposed segregated system existed at the time of the decisions in *Brown* v. *Board of Education*, 347 U. S. 483, 349 U. S. 294. Thereafter racial separation was required by School Board policy. As in *Green*, respondent first took steps in 1965 to abandon that policy to remain eligible for federal financial aid. The Board adopted a "freedom-of-choice" plan embodying the essentials of the plan considered in *Green*. It was made immediately applicable to all grades. Pupils are required to choose annually between the Gould Schools and the Field Schools and those not exercising a choice are assigned to the school previously attended.

The experience after three years of operation with "freedom of choice" has mirrored that in *Green*. Not a single white child has sought to enroll in the all-Negro Field Schools, and although some 80 to 85 Negro children were enrolled in the Gould Schools in 1967, over 85% of the Negro children in the system still attend the all-Negro Field Schools.

This litigation resulted from a problem that arose in the operation of the plan in its first year. The number of children applying for enrollment in the fifth, tenth, and eleventh grades at Gould exceeded the number of places available and applications of 28 Negroes for those grades were refused. This action was thereupon filed on behalf of 16 of these children and others similarly situated. Their complaint sought injunctive relief, among other things, against their being required to attend the Field Schools, against the provision by respondent of public school facilities for Negro pupils inferior to those provided for white pupils, and against respondent's "otherwise operating a racially segregated school system." While the case was pending in the District Court, respondent made plans to replace the high school building at Field Schools. Petitioners sought unsuccessfully to enjoin construction at that site, contending that the new high school should be built at the Gould site to avoid perpetuation of the segregated system. Thereafter the District Court, in an unreported opinion, denied all relief and dismissed the complaint. In the District Court's view the fact that respondent had adopted "freedom of choice" without the compulsion of a court order, that the plan was approved by the Department of Health, Education, and Welfare, and that some Negro pupils had enrolled in the Gould Schools "seems to indicate that this plan is more than a pretense or sham to meet the minimum requirements of the law." In light of this conclusion the District Court held that petitioners were not entitled to the

other relief requested, including an injunction against building the new high school at the Field site. The Court of Appeals for the Eighth Circuit affirmed the dismissal. 381 F. 2d 252. We granted certiorari, 389 U. S. 1034, and set the case for argument following No. 740, *Monroe* v. *Board of Commissioners of the City of Jackson, post,* p. 450.

The Court of Appeals suggested that "no issue on the adequacy of the plan adopted by the Board or its implementation was raised in the District Court. Issues not fairly raised in the District Court cannot ordinarily be considered upon appeal." 381 F. 2d, at 257. Insofar as this refers to the "freedom-of-choice" plan the suggestion is refuted by the record. Not only was the issue embraced by the prayer in petitioners' complaint for an injunction against respondent "otherwise operating a racially segregated school system" but the adequacy of the plan was tried and argued by the parties and decided by the District Court. Moreover, the Court of Appeals went on to consider the merits, holding, in agreement with the District Court, that "we find no substantial evidence to support a finding that the Board was not proceeding to carry out the plan in good faith." *Ibid.*[1] In the circumstances the question of the adequacy of "freedom of choice" is properly before us. On the merits, our decision in *Green* v. *County School Board, supra,* establishes that the plan is inadequate to convert to a unitary, nonracial school system. As in *Green,* "the school system remains a dual system. Rather than further the dismantling of the dual system, the plan has operated simply to burden children and their parents with

[1] Compare the developing views of the feasibility of "freedom-of-choice" plans expressed by various panels of the Court of Appeals for the Eighth Circuit in *Kemp* v. *Beasley,* 352 F. 2d 14; *Clark* v. *Board of Education,* 374 F. 2d 569; *Kelley* v. *Altheimer,* 378 F. 2d 483; *Kemp* v. *Beasley,* 389 F. 2d 178; and *Jackson* v. *Marvell School District No. 22,* 389 F. 2d 740.

a responsibility which *Brown II* placed squarely on the School Board. The Board must be required to formulate a new plan and, in light of other courses which appear open to the Board, such as zoning, fashion steps which promise realistically to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools." *Id.*, at 441–442.

The petitioners did not press in the Court of Appeals their appeal from the denial of their prayer to have the new high school facilities constructed at the Gould Schools site rather than at the Field Schools site. Due to the illness of the court reporter there was delay in the filing of the transcript of the proceedings in the District Court and meanwhile the construction at the Field Schools site was substantially completed. Petitioners therefore modified their position and urged in the Court of Appeals that respondent be required to convert the Gould Schools to a completely desegregated high school and the Field site to a completely desegregated primary school. The Court of Appeals rejected the proposition on the ground that it "was not presented to the trial court and no opportunity was afforded the parties to offer evidence on the feasibility of such a plan, nor was the trial court given any opportunity to pass thereon." 381 F. 2d, at 254. Since there must be a remand, petitioners are not foreclosed from making their proposal an issue in the further proceedings.[2]

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[2] The Court of Appeals, while denying petitioners' request for relief on appeal, did observe that

"there is no showing that the Field facilities with the new construction added could not be converted at a reasonable cost into a completely integrated grade school or into a completely integrated high school when the appropriate time for such course arrives. We note that the building now occupied by the predominantly white Gould grade school had originally been built to house the Gould High School." 381 F. 2d, at 255.

Finally, we hold that in the circumstances of this case, the District Court's dismissal of the complaint was an improper exercise of discretion. Dismissal will ordinarily be inconsistent with the responsibility imposed on the district courts by *Brown II*. 349 U. S., at 299–301. In light of the complexities inhering in the disestablishment of state-established segregated school systems, *Brown II* contemplated that the better course would be to retain jurisdiction until it is clear that disestablishment has been achieved. We agree with the observation of another panel of judges of the Court of Appeals for the Eighth Circuit in another case that the district courts "should retain jurisdiction in school segregation cases to insure (1) that a constitutionally acceptable plan is adopted, and (2) that it is operated in a constitutionally permissible fashion so that the goal of a desegregated, non-racially operated school system is rapidly and finally achieved." *Kelley* v. *Altheimer*, 378 F. 2d 483, 489. See also *Kemp* v. *Beasley*, 389 F. 2d 178.

The judgment of the Court of Appeals is reversed and the case is remanded to the District Court for further proceedings consistent with this opinion and with our opinion in *Green* v. *County School Board, supra*.

It is so ordered.

MONROE ET AL. *v.* BOARD OF COMMISSIONERS OF THE CITY OF JACKSON ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 740. Argued April 3, 1968.—Decided May 27, 1968.

About one-third of the City of Jackson's population of 40,000 are Negroes, the great majority of whom live in the city's central area. The city school system has eight elementary, three junior high, and two senior high schools for the 7,650 students, of whom about 40% are Negroes. Tennessee law in 1954 required racial segregation in schools; five elementary and two junior high schools and one senior high school were operated as "white" schools, and the remainder as "Negro" schools. After *Brown* v. *Board of Education*, 347 U. S. 483 (1954), declared such dual systems unconstitutional, Tennessee enacted a pupil placement law, which gave local school boards exclusive authority to approve assignments. No white students enrolled in any "Negro" school and only seven applications were granted in two years permitting Negro pupils to enroll in "white" schools. In March 1962 the Court of Appeals held that law inadequate "as a plan to convert a biracial system into a nonracial one." This action was brought in January 1963, seeking a declaratory judgment that respondents were operating a racially segregated system, injunctive relief against maintenance of that system, an order directing admission to named "white" schools of Negro plaintiffs, and an order requiring the School Board to formulate and file a desegregation plan. The District Court ordered the students enrolled and the filing of a plan. A plan was filed, and with court-directed modifications, was approved in August 1963, to be effective at once in the elementary schools and to be extended over a four-year period to junior and senior high schools. The modified plan provides for automatic assignment of pupils within attendance zones drawn along geographic or "natural" boundaries, and "according to the capacity and facilities" of the schools. However, the plan also has a "free-transfer" provision by which a student may freely transfer to a school of his choice if space is available, zone residents having priority in case of overcrowding. No bus service is provided. After one year the Negro elementary schools remained

all Negro, and 118 Negro pupils were scattered among four formerly all-white schools. Petitioners moved for further relief and the District Court held the plan had been administered discriminatorily. In the same proceeding the Board filed its proposed zones for the three junior high schools, to which petitioners objected on the grounds that the zones were racially gerrymandered and that the plan was inadequate to reorganize the system on a nonracial basis. Petitioners urged that the Board be required to use a "feeder system," whereby each junior high would draw its students from specific elementary schools. The District Court held that petitioners had not sustained the allegations that the zones were gerrymandered and concluded that "there is no constitutional requirement" that the "feeder system" be adopted. The Court of Appeals affirmed, except on the issue of faculty segregation. Three years later the Negro junior high, which had over 80% of the Negro junior high students, had no white students, one "white" junior high had seven Negroes out of 819 students, and the other had 349 white and 135 Negro pupils. *Held:*

1. The "free-transfer" plan clearly does not meet respondent Board's "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch," *Green* v. *County School Board, ante,* at 437–438, "[r]ather than further the dismantling of the dual system, the ["free-transfer"] plan has operated simply to burden children and their parents with a responsibility . . . placed squarely on the School Board." *Id.,* at 441–442. P. 458.

2. Since it has not been shown that the "free-transfer" plan will further rather than delay conversion to a unitary, nonracial system, it is unacceptable, and the Board must formulate a new plan which promises realistically to convert promptly to a unitary, nondiscriminatory school system. Pp. 459–460.

380 F. 2d 955, vacated in part and remanded.

James M. Nabrit III and *Jack Greenberg* argued the cause for petitioners. With them on the brief were *Michael Meltsner, Avon N. Williams, Jr.,* and *Z. Alexander Looby.*

Russell Rice, Sr., argued the cause and filed a brief for respondents.

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Louis F. Claiborne argued the cause for the United States, as *amicus curiae*. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Pollak, Lawrence G. Wallace,* and *Brian K. Landsberg.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This case was argued with No. 695, *Green* v. *County School Board of New Kent County, ante,* p. 430, and No. 805, *Raney* v. *Board of Education of the Gould School District, ante,* p. 443. The question for decision is similar to the question decided in those cases. Here, however, the principal feature of a desegregation plan—which calls in question its adequacy to effectuate a transition to a racially nondiscriminatory system in compliance with *Brown* v. *Board of Education,* 349 U. S. 294 (*Brown II*)—is not "freedom of choice" but a variant commonly referred to as "free transfer."

The respondent Board of Commissioners is the School Board for the City of Jackson, located in midwestern Tennessee. The school district coincides with the city limits. Some one-third of the city's population of 40,000 are Negroes, the great majority of whom live in the city's central area. The school system has eight elementary schools, three junior high schools, and two senior high schools. There are 7,650 children enrolled in the system's schools, about 40% of whom, over 3,200, are Negroes.

In 1954 Tennessee by law required racial segregation in its public schools. Accordingly, five elementary schools, two junior high schools, and one senior high school were operated as "white" schools, and three elementary schools, one junior high school, and one senior high school were operated as "Negro" schools. Racial segregation extended to all aspects of school life including faculties and staffs.

After *Brown* v. *Board of Education,* 347 U. S. 483 (*Brown I*), declared such state-imposed dual systems unconstitutional, Tennessee enacted a pupil placement law, Tenn. Code § 49–1741 *et seq.* (1966). That law continued previously enrolled pupils in their assigned schools and vested local school boards with the exclusive authority to approve assignment and transfer requests. No white children enrolled in any "Negro" school under the statute and the respondent Board granted only seven applications of Negro children to enroll in "white" schools, three in 1961 and four in 1962. In March 1962 the Court of Appeals for the Sixth Circuit held that the pupil placement law was inadequate "as a plan to convert a biracial system into a nonracial one." *Northcross* v. *Board of Education of City of Memphis,* 302 F. 2d 818, 821.

In January 1963 petitioners brought this action in the District Court for the Western District of Tennessee. The complaint sought a declaratory judgment that respondent was operating a compulsory racially segregated school system, injunctive relief against the continued maintenance of that system, an order directing the admission to named "white" schools of the plaintiff Negro school children, and an order requiring respondent Board to formulate a desegregation plan. The District Court ordered the Board to enroll the children in the schools in question and directed the Board to formulate and file a desegregation plan. A plan was duly filed and, after modifications directed by the court were incorporated, the plan was approved in August 1963 to be effective immediately in the elementary schools and to be gradually extended over a four-year period to the junior high schools and senior high schools. 221 F. Supp. 968.

The modified plan provides for the automatic assignment of pupils living within attendance zones drawn by the Board or school officials along geographic or "natural"

boundaries and "according to the capacity and facilities of the [school] buildings . . ." within the zones. *Id.*, at 974. However, the plan also has the "free-transfer" provision which was ultimately to bring this case to this Court: Any child, after he has complied with the requirement that he register annually in his assigned school in his attendance zone, may freely transfer to another school of his choice if space is available, zone residents having priority in cases of overcrowding. Students must provide their own transportation; the school system does not operate school buses.

By its terms the "free-transfer" plan was first applied in the elementary schools. After one year of operation petitioners, joined by 27 other Negro school children, moved in September 1964 for further relief in the District Court, alleging respondent had administered the plan in a racially discriminatory manner. At that time, the three Negro elementary schools remained all Negro; and 118 Negro pupils were scattered among four of the five formerly all-white elementary schools. After hearing evidence, the District Court found that in two respects the Board had indeed administered the plan in a discriminatory fashion. First, it had systematically denied Negro children—specifically the 27 intervenors—the right to transfer from their all-Negro zone schools to schools where white students were in the majority, although white students seeking transfers from Negro schools to white schools had been allowed to transfer. The court held this to be a constitutional violation, see *Goss* v. *Board of Education*, 373 U. S. 683, as well as a violation of the terms of the plan itself. 244 F. Supp. 353, 359. Second, the court found that the Board, in drawing the lines of the geographic attendance zones, had gerrymandered three elementary school zones to exclude Negro residential areas from white school zones and to include

those areas in zones of Negro schools located farther away. *Id.*, at 361–362.

In the same 1964 proceeding the Board filed with the court its proposed zones for the three junior high schools, Jackson and Tigrett, the "white" junior high schools, and Merry, the "Negro" junior high school. As of the 1964 school year the three schools retained their racial identities, although Jackson did have one Negro child among its otherwise all-white student body. The faculties and staffs of the respective schools were also segregated. Petitioners objected to the proposed zones on two grounds, arguing first that they were racially gerrymandered because so drawn as to assign Negro children to the "Negro" Merry school and white children to the "white" Jackson and Tigrett schools, and alternatively that the plan was in any event inadequate to reorganize the system on a nonracial basis. Petitioners, through expert witnesses, urged that the Board be required to adopt a "feeder system," a commonly used method of assigning students whereby each junior high school would draw its students from specified elementary schools. The groupings could be made so as to assure racially integrated student bodies in all three junior high schools, with due regard for educational and administrative considerations such as building capacity and proximity of students to the schools.

The District Court held that petitioners had not sustained their allegations that the proposed junior high school attendance zones were gerrymandered, saying

> "Tigrett [white] is located in the western section, Merry [Negro] is located in the central section and Jackson [white] is located in the eastern section. The zones proposed by the defendants would, generally, allocate the western section to Tigrett, the central section to Merry, and the eastern section to

> Jackson. The boundaries follow major streets or highways and railroads. According to the school population maps, there are a considerable number of Negro pupils in the southern part of the Tigrett zone, a considerable number of white pupils in the middle and northern parts of the Merry zone, and a considerable number of Negro pupils in the southern part of the Jackson zone. The location of the three schools in an approximate east-west line makes it inevitable that the three zones divide the city in three parts from north to south. While it appears that proximity of pupils and natural boundaries are not as important in zoning for junior highs as in zoning for elementary schools, it does not appear that Negro pupils will be discriminated against." 244 F. Supp., at 362.

As for the recommended "feeder system," the District Court concluded simply that "there is no constitutional requirement that this particular system be adopted." *Ibid.* The Court of Appeals for the Sixth Circuit affirmed except on an issue of faculty desegregation, as to which the case was remanded for further proceedings. 380 F. 2d 955. We granted certiorari, 389 U. S. 1033, and set the case for oral argument immediately following *Green* v. *County School Board, supra.* Although the case presented by the petition for certiorari concerns only the junior high schools, the plan in its application to elementary and senior high schools is also necessarily implicated since the right of "free transfer" extends to pupils at all levels.

The principles governing determination of the adequacy of the plan as compliance with the Board's responsibility to effectuate a transition to a racially nondiscriminatory system are those announced today in *Green* v. *County School Board, supra.* Tested by those

principles the plan is clearly inadequate. Three school years have followed the District Court's approval of the attendance zones for the junior high schools. Yet Merry Junior High School was still completely a "Negro" school in the 1967–1968 school year, enrolling some 640 Negro pupils, or over 80% of the system's Negro junior high school students. Not one of the "considerable number of white pupils in the middle and northern parts of the Merry zone" assigned there under the attendance zone aspect of the plan chose to stay at Merry. Every one exercised his option to transfer out of the "Negro" school. The "white" Tigrett school seemingly had the same experience in reverse. Of the "considerable number of Negro pupils in the southern part of the Tigrett zone" mentioned by the District Court, only seven are enrolled in the student body of 819; apparently all other Negro children assigned to Tigrett chose to go elsewhere. Only the "white" Jackson school presents a different picture; there, 349 white children and 135 Negro children compose the student body. How many of the Negro children transferred in from the "white" Tigrett school does not appear. The experience in the junior high schools mirrors that of the elementary schools. Thus the three elementary schools that were operated as Negro schools in 1954 and continued as such until 1963 are still attended only by Negroes. The five "white" schools all have some Negro children enrolled, from as few as three (in a student body of 781) to as many as 160 (in a student body of 682).

This experience with "free transfer" was accurately predicted by the District Court as early as 1963:

> "In terms of numbers . . . the ratio of Negro to white pupils is approximately 40–60. This figure is, however, somewhat misleading as a measure of the extent to which integration will actually occur

> under the proposed plan. Because the homes of Negro children are concentrated in certain areas of the city, a plan of unitary zoning, even if prepared without consideration of race, will result in a concentration of Negro children in the zones of heretofore 'Negro' schools and white children in the zones of heretofore 'white' schools. *Moreover, this tendency of concentration in schools will be further accentuated by the exercise of choice of schools . . . .*" 221 F. Supp., at 971. (Emphasis supplied.)

Plainly, the plan does not meet respondent's "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Green* v. *County School Board, supra,* at 437–438. Only by dismantling the state-imposed dual system can that end be achieved. And manifestly, that end has not been achieved here nor does the plan approved by the lower courts for the junior high schools promise meaningful progress toward doing so. "Rather than further the dismantling of the dual system, the ["free transfer"] plan has operated simply to burden children and their parents with a responsibility which *Brown II* placed squarely on the School Board." *Green* v. *County School Board, supra,* at 441–442. That the Board has chosen to adopt a method achieving minimal disruption of the old pattern is evident from its long delay in making any effort whatsoever to desegregate, and the deliberately discriminatory manner in which the Board administered the plan until checked by the District Court.

The District Court approved the junior high school attendance-zone lines in the view that as drawn they assigned students to the three schools in a way that was capable of producing meaningful desegregation of all three schools. But the "free-transfer" option has

permitted the "considerable number" of white or Negro students in at least two of the zones to return, at the implicit invitation of the Board, to the comfortable security of the old, established discriminatory pattern. Like the transfer provisions held invalid in *Goss* v. *Board of Education,* 373 U. S. 683, 686, "[i]t is readily apparent that the transfer [provision] lends itself to perpetuation of segregation." While we there indicated that "free-transfer" plans under some circumstances might be valid, we explicitly stated that "no official transfer plan or provision of which racial segregation is the inevitable consequence may stand under the Fourteenth Amendment." *Id.,* at 689. So it is here; no attempt has been made to justify the transfer provision as a device designed to meet "legitimate local problems," *ibid.;* rather it patently operates as a device to allow *resegregation* of the races to the extent desegregation would be achieved by geographically drawn zones. Respondent's argument in this Court reveals its purpose. We are frankly told in the Brief that without the transfer option it is apprehended that white students will flee the school system altogether. "But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." *Brown II,* at 300.

We do not hold that "free transfer" can have no place in a desegregation plan. But like "freedom of choice," if it cannot be shown that such a plan will further rather than delay conversion to a unitary, nonracial, nondiscriminatory school system, it must be held unacceptable. See *Green* v. *County School Board, supra,* at 439–441.

We conclude, therefore, that the Board "must be required to formulate a new plan and, in light of other courses which appear open to the Board, . . . fashion steps which promise realistically to convert promptly to a

system without a 'white' school and a 'Negro' school, but just schools." *Id.*, at 442.*

The judgment of the Court of Appeals is vacated insofar as it affirmed the District Court's approval of the plan in its application to the junior high schools, and the case is remanded for further proceedings consistent with this opinion and with our opinion in *Green* v. *County School Board, supra.*

It is so ordered.

*We imply no agreement with the District Court's conclusion that under the proposed attendance zones for junior high schools "it does not appear that Negro pupils will be discriminated against." We note also that on the record as it now stands, it appears that petitioners' recommended "feeder system," the feasibility of which respondent did not challenge in the District Court, is an effective alternative reasonably available to respondent to abolish the dual system in the junior high schools.

WORLD AIRWAYS, INC., ET AL. *v.* PAN AMERICAN WORLD AIRWAYS, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 800. Argued April 29–30, 1968.—Decided May 27, 1968.*

380 F. 2d 770, affirmed by an equally divided Court.

Assistant Attorney General Wozencraft argued the cause for petitioner in No. 946. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Turner, Howard E. Shapiro, Joseph B. Goldman, O. D. Ozment, Warren L. Sharfman,* and *Robert L. Toomey. Jerrold Scoutt, Jr.,* argued the cause for petitioners in Nos. 800 and 969. With him on the brief for petitioners in No. 800 were *Leonard N. Bebchick, George Berkowitz, Stephen D. Potts, Clayton L. Burwell,* and *Frederick Bernays Wiener. Charles A. Hobbs* and *Glen A. Wilkinson* filed briefs for petitioner in No. 969.

Edward R. Neaher argued the cause for respondents in all cases. With him on the brief were *Carl S. Rowe* and *Gertrude S. Rosenthal.*

PER CURIAM.

The judgment of the United States Court of Appeals for the Second Circuit is affirmed by an equally divided Court.

MR. JUSTICE MARSHALL took no part in the consideration or decision of these cases.

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*Together with No. 946, *Civil Aeronautics Board* v. *Pan American World Airways, Inc., et al.,* and No. 969, *American Society of Travel Agents, Inc.* v. *Pan American World Airways, Inc., et al.,* also on certiorari to the same court.

RABECK *v.* NEW YORK.

APPEAL FROM THE APPELLATE TERM OF THE SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT.

No. 611. Decided May 27, 1968.

Former § 484–i of the New York Penal Law, which prohibited the sale of "magazines . . . which would appeal to the lust of persons under the age of eighteen years or to their curiosity as to sex or to the anatomical differences between the sexes," is unconstitutionally vague and it is no answer to say that it was adopted for the salutary purpose of protecting children.

Reversed.

Stanley Fleishman, Osmond K. Fraenkel, and *Sam Rosenwein* for appellant.

Isidore Dollinger and *Daniel J. Sullivan* for appellee.

PER CURIAM.

Appellant, in seeking reversal of his conviction for selling "girlie" magazines to a minor under 18 years of age in violation of former § 484–i, New York Penal Law,* argues among other grounds that the statute is impermissibly vague. We agree. While we rejected a like claim as to § 484–h in *Ginsberg* v. *New York,* 390 U. S. 629, § 484–i in part prohibited the sale of "any . . . magazines . . . which would appeal to the lust of persons under the age of eighteen years or to their curiosity as to sex or to the anatomical differences between the sexes . . . ." That standard in our view is unconstitutionally vague. "Nor is it an answer to an argument that a particular regulation of expression is vague to say that it was adopted for the salutary purpose of protecting children. The permissible extent of vagueness is

*Section 484–i was repealed by N. Y. Laws 1967, c. 791. See *Ginsberg* v. *New York,* 390 U. S. 629, 631–632, n. 1.

not directly proportional to, or a function of, the extent of the power to regulate or control expression with respect to children." *Interstate Circuit, Inc.* v. *City of Dallas,* 390 U. S. 676, 689.

Reversed.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK concurs, would reverse for the reasons stated in his dissenting opinion in *Ginsberg* v. *New York,* 390 U. S. 629, 650.

MR. JUSTICE HARLAN would affirm the judgment of the state court on the premises stated in his separate opinion in *Interstate Circuit, Inc.* v. *City of Dallas,* 390 U. S. 676, 704. In addition, he considers it a particularly fruitless judicial act to strike down on the score of vagueness a state statute which has already been repealed.

GARRISON *v.* PATTERSON, WARDEN.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 791, Misc. Decided May 27, 1968.

Petitioner, who was under sentence of death for murder, sought a writ of habeas corpus in the District Court. That court denied the writ, denied a certificate of probable cause to appeal, but granted a stay of execution to allow for an appeal. Petitioner filed with the Court of Appeals a document stating the formal history of the case, noting one of the issues, and alleging that the petition "merits further hearing by the Court," which requested a further stay of execution, a certificate of probable cause, and leave to appeal *in forma pauperis*. The next day counsel were heard orally by a panel of the court in an unrecorded hearing. The court granted the stay of execution and thereafter, without further argument or submissions, granted the certificate of probable cause and affirmed the lower court's denial of habeas corpus. *Held:* Where an appeal possesses sufficient merit to warrant a certificate of probable cause, appellant must be afforded adequate opportunity to address the merits, and if a summary procedure is adopted he must be informed, by rule or otherwise, that his opportunity will or may be limited.

Certiorari granted; vacated and remanded.

E. Barrett Prettyman, Jr., and *Isaac Mellman* for petitioner.

Duke W. Dunbar, Attorney General of Colorado, *Frank E. Hickey*, Deputy Attorney General, and *John P. Moore*, Assistant Attorney General, for respondent.

PER CURIAM.

On November 27, 1959, petitioner was found guilty of first degree murder by a Colorado jury, which fixed his penalty at death. Following subsequent state proceedings, he sought a writ of habeas corpus in the United States District Court for the District of Colorado. He alleged that he had received inadequate representation

by appointed trial counsel,[1] that the trial court had not properly determined the voluntariness of confessions admitted against him, and that the procedure used to determine his sanity fell short of constitutional requirements. On June 2, 1967, the District Court denied the writ, denied a certificate of probable cause to appeal, see 28 U. S. C. § 2253, but granted a stay of execution to June 16, 1967, to allow time for appeal. The District Court filed a written opinion and order to that effect on June 5, 1967.

Three days later, on June 8, petitioner's attorneys filed with the Court of Appeals for the Tenth Circuit a three-page document requesting a further stay of execution, a certificate of probable cause to appeal, and leave to appeal *in forma pauperis*. This document merely stated the formal history of the case in numbered paragraphs, noted one of the issues, and alleged that "this petition merits further hearing by this Court." On the following day, June 9, counsel were heard orally by a panel of the Court of Appeals. The hearing was not recorded. The court granted a further stay of execution. On June 18, without further argument or submissions by counsel, the Court of Appeals issued an order granting the certificate of probable cause, and, in the next sentence, affirming the District Court's denial of habeas corpus. Petitioner sought a writ of certiorari in this Court, alleging that the procedure followed by the Court of Appeals violated the standards established by, or implicit in, *Nowakowski* v. *Maroney*, 386 U. S. 542.

We grant the writ, vacate the judgment of the Court of Appeals, and remand to that court for further appro-

[1] Petitioner's statement of facts alleges not only that trial counsel was guilty of egregious neglect at trial but also that there were understandable reasons: there is said to be evidence that during the period of the trial the attorney's attention was preoccupied with other matters, to wit, the commission of a series of felonies.

priate proceedings. *Nowakowski, supra,* held that when a district court grants a certificate of probable cause the court of appeals must "proceed to a disposition of the appeal in accord with its ordinary procedure." 386 U. S., at 543. The principle underlying that decision was that if an appellant persuades an appropriate tribunal that probable cause for an appeal exists, he must then be afforded an opportunity to address the underlying merits. This principle is no less applicable when a court of appeals, having received submissions relating only to probable cause and other procedural matters, decides that probable cause indeed exists.

As we only recently noted in *Carafas* v. *LaVallee, ante,* p. 234, at 242, *Nowakowski* does not prevent the courts of appeals from adopting appropriate summary procedures for final disposition of such cases. *Carafas* requires the courts of appeals to give sufficient indication that an appeal has been disposed of on the merits, but nothing in *Nowakowski* and nothing we say here prevents the courts of appeals from considering the questions of probable cause and the merits together, and nothing said there or here necessarily requires full briefing and oral argument in every instance in which a certificate is granted. We hold only that where an appeal possesses sufficient merit to warrant a certificate, the appellant must be afforded adequate opportunity to address the merits, and that if a summary procedure is adopted the appellant must be informed, by rule or otherwise, that his opportunity will or may be limited.[2] Within this

[2] In an effort to determine whether the merits had been addressed, and whether petitioner was on notice that they should be addressed in full, at the unrecorded hearing on June 9, this Court solicited further submissions from the parties in this case. Petitioner replied that the merits had been raised only to the extent necessary to show grounds for a certificate of probable cause. Respondent replied that petitioner was given all the time he wanted. Respondent was

general framework, the promulgation of specific procedures is a matter for the courts of appeals.

The motion to proceed *in forma pauperis* and petition for a writ of certiorari are granted. The judgment of the Court of Appeals affirming the judgment of the District Court is vacated, and the case is remanded for further proceedings in conformity with this opinion. The stay of execution heretofore granted by MR. JUSTICE WHITE is continued in force pending the disposition of the matter by the Court of Appeals, on condition that the petitioner proceed with due diligence in that court.

It is so ordered.

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unable, however, to point to any rule or decision forewarning an applicant for a certificate of probable cause to make his argument on the underlying issues in full.

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THEATRES SERVICE CO. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA.

No. 1267. Decided May 27, 1968.

278 F. Supp. 7, affirmed.

David A. Sutherlund and *Guy H. Postell* for appellant.

Solicitor General Griswold, Assistant Attorney General Turner, and *Robert W. Ginnane* for the United States et al., and *Paul M. Daniell* and *Bill R. Davis* for Dance Freight Lines, Inc., appellees.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

NATIONAL BUS TRAFFIC ASSN., INC., ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 1312. Decided May 27, 1968.

284 F. Supp. 270, affirmed.

Robert J. Bernard, Warren A. Goff, Drew L. Carraway, John S. Fessenden, and *Richard R. Sigmon* for appellants.

Solicitor General Griswold, Assistant Attorney General Turner, Howard E. Shapiro, and *Robert W. Ginnane* for the United States et al., and *T. S. Christopher* for Rosenbaum, appellees.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

CENTRAL BANK & TRUST CO. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY.

No. 1269. Decided May 27, 1968.*

280 F. Supp. 260, affirmed.

Earl S. Wilson, Earl W. Kintner, Sidney Harris, and *George R. Kucik* for appellant in No. 1269, and *Mr. Wilson* and *Frank S. Ginocchio* for appellant in No. 1270.

Solicitor General Griswold, Assistant Attorney General Turner, and *Howard E. Shapiro* for the United States, and *Paul A. Porter* and *Victor H. Kramer* for First National Bank & Trust Co. et al., appellees in both cases.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

MR. JUSTICE BLACK and MR. JUSTICE WHITE would note probable jurisdiction and set these cases for oral argument.

MR. JUSTICE FORTAS took no part in the consideration or decision of these cases.

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*Together with No. 1270, *Boyle* v. *United States et al.*, also on appeal from the same court.

ROSS *v.* CALIFORNIA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 798, Misc. Decided May 27, 1968.

Certiorari granted; 67 Cal. 2d 64, 429 P. 2d 606, reversed.

Thomas C. Lynch, Attorney General of California, *William E. James*, Assistant Attorney General, and *Walter R. Jones*, Deputy Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is reversed. *Chapman* v. *California*, 386 U. S. 18, and *Anderson* v. *Nelson*, 390 U. S. 523.

MR. JUSTICE BLACK is of the opinion that certiorari should be denied.

READING CO. *v.* BROWN, TRUSTEE IN BANKRUPTCY, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 127. Argued March 4–5, 1968.—Decided June 3, 1968.

A realty corporation filed a petition for arrangement under Chapter XI of the Bankruptcy Act. The District Court appointed respondent Brown as receiver and authorized him to operate the debtor's business, which consisted principally of leasing an industrial building, the debtor's only significant asset. Fire destroyed the building and spread to and destroyed the property of petitioner and others. Petitioner filed a claim for "administrative expenses" of the arrangement based on the receiver's asserted negligence and others filed 146 additional similar claims. Thereafter the realty company was voluntarily adjudicated a bankrupt and petitioner's and the others' claims thus became claims for administration expenses in bankruptcy. Under § 64a (1) of the Bankruptcy Act "the costs and expenses of administration, including the actual and necessary costs and expenses of preserving the estate," are given first priority, and it is agreed that that provision applies to administration expenses of Chapter XI arrangements. Brown, who had been elected trustee, moved to expunge the claims as not being expenses of administration. It was agreed (1) that the decision as to whether petitioner's claim was thus provable would apply to the other 146 claims and (2) that, for purposes of deciding whether the claim is provable, the damage to petitioner's property resulted from the negligence of the receiver and a workman he employed. The District Court upheld the referee's disallowance of the claim, and the Court of Appeals affirmed. The United States, the holder of a tax claim, which had entered the case on the side of the trustee, urges as a respondent that tort claims during an arrangement, if properly preserved, are provable only as general claims in any subsequent bankruptcy, under § 63a of the Act, which provides that "[d]ebts of the bankrupt may be proved and allowed against his estate which are founded upon . . . (7) the right to recover damages in any action for negligence instituted prior to and pending at the time of the filing of the petition in bankruptcy . . . ." *Held:* Damages resulting

from the negligence of a receiver acting within the scope of his authority as receiver give rise to "actual and necessary" costs of operating the debtor's business under a Chapter XI arrangement and are thus entitled to the priority status accorded to costs of administration by § 64a (1) of the Bankruptcy Act. Pp. 476–485.

(a) The trustee's contention that first priority as "necessary" expenses should be given only to those expenditures which are necessary to encourage third parties to deal with an insolvent business overlooks the statutory objective of fairness to all claimants against an insolvent. P. 477.

(b) Petitioner, which in principle concededly has a right to recover against the "employer" (the business under arrangement) of the receiver and workman who inflicted the injury, under the rule of *respondeat superior*, did not merely suffer injury at the hands of an insolvent business: it had an insolvent business thrust upon it by operation of law. Pp. 477–478.

(c) It would not comport with the principle of *respondeat superior* or the rule of fairness in bankruptcy to seek the objectives of a Chapter XI arrangement at the cost of excluding the arrangement's tort creditors or totally subordinating their claims to those for whose benefit the arrangement is instituted. P. 479.

(d) A tort claim arising during an arrangement, like a tort claim arising during a bankruptcy proceeding proper, is not provable as a general claim in bankruptcy under § 63. To establish a claim under that provision suit must be filed before the filing of the petition in bankruptcy and when the section is applied to an arrangement, the date of the filing of the petition in bankruptcy is deemed to be the date of the filing of the arrangement petition; and in any event a claim under § 63a must be a claim against the debtor, not against the estate, in a Chapter XI arrangement. Pp. 479–483.

(e) The costs of insurance against tort claims arising during an arrangement are administration expenses payable in full under § 64a (1), and if a receiver or debtor in possession is to be encouraged to obtain adequate insurance, the claims against which the insurance is obtained should be potentially payable in full. P. 483.

(f) The long-established rule of equity receiverships, that torts of the receivership create claims against the receivership itself, provides an analogy to the situation here. Pp. 483–484.

370 F. 2d 624, reversed and remanded.

Thomas Raeburn White, Jr., argued the cause for petitioner. With him on the briefs was *H. Merle Mulloy.*

Owen B. Rhoads argued the cause for respondent Brown. With him on the brief were *Samuel Marx* and *Arthur E. Newbold III.*

Richard M. Roberts argued the cause for the United States. On the brief were *Solicitor General Griswold, Assistant Attorney General Rogovin, Harris Weinstein, Crombie J. D. Garrett,* and *Edward Lee Rogers.*

MR. JUSTICE HARLAN delivered the opinion of the Court.

On November 16, 1962, I. J. Knight Realty Corporation filed a petition for an arrangement under Chapter XI of the Bankruptcy Act, 11 U. S. C. §§ 701–799. The same day, the District Court appointed a receiver, Francis Shunk Brown, a respondent here. The receiver was authorized to conduct the debtor's business, which consisted principally of leasing the debtor's only significant asset, an eight-story industrial structure located in Philadelphia.

On January 1, 1963, the building was totally destroyed by a fire which spread to adjoining premises and destroyed real and personal property of petitioner Reading Company and others. On April 3, 1963, petitioner filed a claim for $559,730.83 in the arrangement, based on the asserted negligence of the receiver. It was styled a claim for "administrative expenses" of the arrangement. Other fire loss claimants filed 146 additional claims of a similar nature. The total of all such claims was in excess of $3,500,000, substantially more than the total assets of the debtor.

On May 14, 1963, Knight Realty was voluntarily adjudicated a bankrupt and respondent receiver was subsequently elected trustee in bankruptcy. The claims of petitioner and others thus became claims for administra-

tion expenses in bankruptcy which are given first priority under § 64a (1) of the Bankruptcy Act, 11 U. S. C. § 104 (a)(1).[1] The trustee moved to expunge the claims on the ground that they were not for expenses of administration. It was agreed that the decision whether petitioner's claim is provable as an expense of administration would establish the status of the other 146 claims. It was further agreed that, for purposes of deciding whether the claim is provable, it would be assumed that the damage to petitioner's property resulted from the negligence of the receiver and a workman he employed.[2] The United States, holding a claim for unpaid prearrangement taxes admittedly superior to the claims of general creditors and inferior to claims for administration expenses, entered the case on the side of the trustee.

The referee disallowed the claim for administration expenses. He also ruled that petitioner's claim was not provable as a general claim against the estate, a ruling challenged by neither side.[3] On petition for review, the

[1] Section 302 of the Act, as set forth in 11 U. S. C. § 702, provides in part as follows:

"The provisions of chapters 1–7 of this title shall, insofar as they are not inconsistent with or in conflict with the provisions of this chapter [XI], apply in proceedings under this chapter."

Section 64a (1), a part of Chapter VII and hence applicable to Chapter XI arrangements by virtue of § 302, itself provides that where, as here, ordinary bankruptcy ensues upon a proceeding under another chapter,

"the costs and expenses of administration incurred in the ensuing bankruptcy proceeding shall have priority in advance of payment of the unpaid costs and expenses of administration . . . incurred in the superseded proceeding . . . ."

We deal here, therefore, with a claim that will in any event be subordinate to administration expenses of the bankruptcy proper.

[2] Thus the merits of negligence claims have not been adjudicated, and, of course, we intimate no views upon them.

[3] See *infra*, at 480.

referee was upheld by the District Court. On appeal, the Court of Appeals for the Third Circuit, sitting *en banc*, affirmed the decision of the District Court by a 4–3 vote. We granted certiorari, 389 U. S. 895, because the issue is important in the administration of the bankruptcy laws and is one of first impression in this Court. For reasons to follow, we reverse.

Section 64a of the Bankruptcy Act provides in part as follows:

> "The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be (1) the costs and expenses of administration, including the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition . . . ."

It is agreed that this section, applicable by its terms to straight bankruptcies, governs payment of administration expenses of Chapter XI arrangements. Furthermore, it is agreed that for the purpose of applying this section to arrangements, the words "subsequent to filing the petition" refer to the period subsequent to the *arrangement* petition,[4] and the words "preserving the estate" include the larger objective, common to arrangements, of operating the debtor's business with a view to rehabilitating it.[5]

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[4] This is explicitly provided in § 302.

[5] Compare 3 Collier, Bankruptcy ¶ 62.15:

"Section 2a (5) empowers the court to authorize the business of bankrupts to be conducted for a limited period by a marshal, receiver or trustee. Such continued operation of a business is in substance a means of preservation, namely as a going concern, sometimes with a view to rehabilitation . . . . Expenditure incurred by continued operation of a bankrupt's business will, therefore, on principle, follow the rules . . . as to expenditure in connection

The question in this case is whether the negligence of a receiver administering an estate under a Chapter XI arrangement gives rise to an "actual and necessary" cost of operating the debtor's business. The Act does not define "actual and necessary," nor has any case directly in point been brought to our attention.[6] We must, therefore, look to the general purposes of § 64a, Chapter XI, and the Bankruptcy Act as a whole.

The trustee contends that the relevant statutory objectives are (1) to facilitate rehabilitation of insolvent businesses and (2) to preserve a maximum of assets for

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with preservation. The difference, if any, lies in the greater variety of types of expenses . . . ." (Footnotes omitted.)

[6] The case that petitioner finds most closely in point is *Vass* v. *Conron Bros.*, 59 F. 2d 969. Vass was the receiver of certain bankrupts who had been dealers in cold meats and had leased space in their cold storage plant to Conron. Vass confirmed the lease, one of whose covenants provided that the lessor would maintain sufficient refrigeration; thereafter, Vass allegedly failed to refrigerate properly, damaging stored property of the lessee. The lessee then attempted to sue Vass in a state court, alleging breach of the covenant and negligence. Vass, however, obtained an injunction from the bankruptcy court against the state action; the Court of Appeals affirmed in an opinion by L. Hand.

The issue in *Vass* was whether the state action would conflict with the bankruptcy court's jurisdiction over the estate. In ruling that the action could not be maintained, Judge Hand concluded, *inter alia*, that the action did *not* fall within the federal statutory permission for actions based on any liability arising out of "any act or transaction" of the trustee "in carrying on the business connected with" the property entrusted to him. Judge Hand concluded, on special facts, that the trustee in confirming the lease was merely holding matters *in statu quo*, not continuing the business. Consequently, he said that "the liquidation of the lessee's resulting damages was as much a part of the usual administration in bankruptcy, as that of the pay of accountants, custodians or other assistants." 59 F. 2d, at 971. In context, the language just quoted is of little assistance in the present case.

distribution among the general creditors should the arrangement fail. He therefore argues that first priority as "necessary" expenses should be given only to those expenditures without which the insolvent business could not be carried on. For example, the trustee would allow first priority to contracts entered into by the receiver because suppliers, employees, landlords, and the like would not enter into dealings with a debtor in possession or a receiver of an insolvent business unless priority is allowed. The trustee would exclude all negligence claims, on the theory that first priority for them is not necessary to encourage third parties to deal with an insolvent business, that first priority would reduce the amount available for the general creditors, and that first priority would discourage general creditors from accepting arrangements.

In our view the trustee has overlooked one important, and here decisive, statutory objective: fairness to all persons having claims against an insolvent. Petitioner suffered grave financial injury from what is here agreed to have been the negligence of the receiver and a workman. It is conceded that, in principle, petitioner has a right to recover for that injury from their "employer," the business under arrangement, upon the rule of *respondeat superior*.[7] Respondents contend, however, that

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[7] 28 U. S. C. § 959 (b) provides as follows:

"A trustee, receiver or manager appointed in any cause pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof."

This provision of course establishes only the principle of liability under state tort and agency law, and does not decide from whom

petitioner is in no different position from anyone else injured by a person with scant assets: its right to recover exists in theory but is not enforceable in practice.

That, however, is not an adequate description of petitioner's position. At the moment when an arrangement is sought, the debtor is insolvent. Its existing creditors hope that by partial or complete postponement of their claims they will, through successful rehabilitation, eventually recover from the debtor either in full or in larger proportion than they would in immediate bankruptcy. Hence the present petitioner did not merely suffer injury at the hands of an insolvent business: it had an insolvent business thrust upon it by operation of law. That business will, in any event, be unable to pay its fire debts in full. But the question is whether the fire claimants should be subordinated to, should share equally with, or should collect ahead of those creditors for whose benefit the continued operation of the business (which unfortunately led to a fire instead of the hoped-for rehabilitation) was allowed.

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or with what priority tort claims may be collected. In *McNulta* v. *Lochridge*, 141 U. S. 327, 332, this Court had occasion to note that "[a]ctions against the receiver are in law actions against the receivership, or the funds in the hands of the receiver, and his contracts, misfeasances, negligences and liabilities are official and not personal, and judgments against him as receiver are payable only from the funds in his hands."

This statement of course means only that torts of a receiver are in principle compensable out of the assets of the estate in receivership and, again, does not indicate whether such claims shall be paid prior to, equally with, or after other claims against the receivership.

We do not here reach, and do not mean to reaffirm the implication of *McNulta* that an action against the receiver personally, or against the debtor after termination of the receivership, would never lie under any circumstances. As to such questions, the statement of *McNulta* is dictum.

Recognizing that petitioner ought to have some means of asserting its claim against the business whose operation resulted in the fire, respondents have suggested various theories as alternatives to "administration expense" treatment. None of these has case support, and all seem to us unsatisfactory.

Several need not be pursued in detail. The trustee contends that if the present claims are not provable in bankruptcy they would survive as claims against the shell. He also suggests that petitioner may be able to recover from the receiver personally, or out of such bond as he posted. Without deciding whether these possible avenues are indeed open,[8] we merely note that they do not serve the present purpose. The "master," liable for the negligence of the "servant" in this case was the business operating under a Chapter XI arrangement for the benefit of creditors and with the hope of rehabilitation. That benefit and that rehabilitation are worthy objectives. But it would be inconsistent both with the principle of *respondeat superior* and with the rule of fairness in bankruptcy to seek these objectives at the cost of excluding tort creditors of the arrangement from its assets, or totally subordinating the claims of those on whom the arrangement is imposed to the claims of those for whose benefit it is instituted.

The United States, as a respondent, suggests instead that tort claims arising during an arrangement are, if properly preserved, provable general claims in any subsequent bankruptcy under § 63a of the Act, 11 U. S. C. § 103 (a). That section reads as follows:

> "Debts of the bankrupt may be proved and allowed against his estate which are founded upon . . . (7) the right to recover damages in any action for

[8] See n. 7, *supra*.

> negligence instituted prior to and pending at the time of the filing of the petition in bankruptcy . . . ."

It is agreed by all parties that this section will not avail the present petitioner who, it appears, did not file suit on its claim prior to the bankruptcy proper. This, the United States argues, is its own fault: it could have filed suit after the tort, during the arrangement, and before the petition in bankruptcy, and thus preserved its claim.

This was not the view of the District Court. Section 302 of the Act, the section which provides that Chapters I to VII of the Act (including §§ 63 and 64) shall be applicable to arrangements under Chapter XI as well as straight bankruptcies, contains the following provision:

> "For the purposes of such application the date of the filing of the petition in bankruptcy shall be taken to be the date of the filing of an original petition under section 722 of this title [§ 322 of the Act, 11 U. S. C. § 722, which provides for filing original petitions for arrangements] . . . ."

Section 378 (2) of the Act, 11 U. S. C. § 778 (2), dealing with procedure when bankruptcy ensues upon an arrangement, provides that

> "in the case of a petition filed under section 722 of this title, the proceeding shall be conducted, so far as possible, in the same manner and with like effect as if a voluntary petition for adjudication in bankruptcy had been filed and a decree of adjudication had been entered on the day when the petition under this chapter [*i. e.*, the petition for an arrangement] was filed . . . ."

The effect of these two sections is that, whether or not an arrangement is superseded by bankruptcy, for purposes of applying § 63 to arrangements the date of the arrangement petition is deemed to be the date of a petition in bankruptcy.

From this fact, the District Court concluded, and petitioner now argues, that a person negligently injured during the course of an arrangement could never have a provable general claim under § 63a. For that section requires that suit be filed before the filing of the petition in bankruptcy, and, when the section is applied to an arrangement, the date of the filing of the petition in bankruptcy is deemed to be the date of the filing of the arrangement petition.

In response, the United States notes that § 378 (2) is qualified by the words "so far as possible." The Government therefore suggests a holding that it is not "possible" to treat the date of the arrangement petition as the critical date in a case such as the present, because that point in time antedates the tort. On that theory, it is suggested that, for present purposes, § 63a's reference to the date of filing the bankruptcy petition be taken to refer to the date of the petition in bankruptcy proper.

We do not find this an acceptable alternative. The only thing that renders it not "possible" to follow the statutory scheme and meld the arrangement into the bankruptcy is the Government's insistence that petitioner's claim must be held to have been provable under § 63a if only petitioner had taken the proper steps. There is nothing "impossible" about construing the sections here involved to mean what they say: a tort claim arising during an arrangement, like a tort claim arising during a bankruptcy proceeding proper, is not provable as a general claim in the bankruptcy.

There are additional reasons for reading the sections literally in this case. In the first place, the United States' suggestion will not work where bankruptcy does not ensue upon the arrangement, for then there is no later date that can be used as the cutoff for 63a (7) claims. In that case, it would be necessary either to hold that a tort claim arising during an arrangement is a prov-

able general claim if bankruptcy ensues but is not a provable general claim in the arrangement itself, or to hold that there is no time limit on filing suit so long as the arrangement remains an arrangement. Nothing in the qualifying language of § 378 (2) grants permission to read the time limitation out of § 63a (7) of the Act.

An even greater difficulty is presented by the fact that § 63a refers to provable debts of the *bankrupt*, and distinguishes the bankrupt from his *estate*. Section 302 provides that in applying § 63a to arrangements, the word "bankrupts" shall be deemed to relate also to "debtors." Thus the natural reading of § 63a, when applied to arrangements as if they were bankruptcies, is that in order to be provable under § 63a (7) a tort claim must be a claim against the debtor and not against the estate in a Chapter XI arrangement. Respondents might argue this question as they do the time limitation: that it would be preferable to deem the words "debts of the bankrupt" to mean "debts of the debtor or of his estate arising up to the time of bankruptcy proper." This argument is open, however, to the same objections as the argument on time limitations: it is a strained reading of the statute which makes no allowance for the occasions when straight bankruptcy does not ensue.

In any event, we see no reason to indulge in a strained construction of the relevant provisions, for we are persuaded that it is theoretically sounder, as well as linguistically more comfortable, to treat tort claims arising during an arrangement as actual and necessary expenses of the arrangement rather than debts of the bankrupt. In the first place, in considering whether those injured by the operation of the business during an arrangement should share equally with, or recover ahead of, those for whose benefit the business is carried on, the latter seems more natural and just. Existing creditors are, to

be sure, in a dilemma not of their own making, but there is no obvious reason why they should be allowed to attempt to escape that dilemma at the risk of imposing it on others equally innocent.

More directly in point is the possibility of insurance. An arrangement may provide for suitable coverage, and the court below recognized that the cost of insurance against tort claims arising during an arrangement is an administrative expense payable in full under § 64a (1) before dividends to general creditors.[9] It is of course obvious that proper insurance premiums must be given priority, else insurance could not be obtained; and if a receiver or debtor in possession is to be encouraged to obtain insurance in adequate amounts, the claims against which insurance is obtained should be potentially payable in full. In the present case, it is argued, the fire was of such incredible magnitude that adequate insurance probably could not have been obtained and in any event would have been foolish; this may be true, as it is also true that allowance of a first priority to the fire claimants here will still only mean recovery by them of a fraction of their damages. In the usual case where damages are within insurable limits, however, the rule of full recovery for torts is demonstrably sounder.

Although there appear to be no cases dealing with tort claims arising during Chapter XI proceedings, decisions in analogous cases suggest that "actual and necessary costs" should include costs ordinarily incident to operation of a business, and not be limited to costs without which rehabilitation would be impossible. It has long been the rule of equity receiverships that torts of the receivership create claims against the receivership itself; [10] in those cases the statutory limitation to "actual

[9] 370 F. 2d 624, 628.

[10] *E. g., Texas & Pacific R. Co.* v. *Bloom,* 164 U. S. 636; *Bereth* v. *Sparks,* 51 F. 2d 441; § 77 (n), 11 U. S. C. § 205 (n), according

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and necessary costs" is not involved, but the explicit recognition extended to tort claims in those cases weighs heavily in favor of considering them within the general category of costs and expenses.

In some cases arising under Chapter XI it has been recognized that "actual and necessary costs" are not limited to those claims which the business must be able to pay in full if it is to be able to deal at all. For example, state and federal taxes accruing during a receivership have been held to be actual and necessary costs of an arrangement.[11] The United States, recognizing and supporting these holdings, agrees with petitioner that costs that form "an integral and essential element of the continuation of the business" are necessary expenses even though priority is not necessary *to* the continuation of the business. Thus the Government suggests that "an injury to a member of the public—a business invitee—who was injured while on the business premises during an arrangement would present a completely different problem [*i. e.*, could qualify for first priority]" although it is not suggested

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particular recognition to the tort claims of railroad employees, does not, as the dissent suggests, mean that other tort claims are not chargeable against a receivership itself. Rather, as the United States concedes, "tort claims arising during a receivership or reorganization period . . . have generally been given the priority status of general administrative expenses."

[11] *E. g., Nicholas* v. *United States,* 384 U. S. 678. At pages 687–688 we stated:

"Taxes incurred in the pre-arrangement period must be content with a fourth priority under § 64a (4) of the Bankruptcy Act. On the other hand, taxes incurred during the arrangement period are expenses of Chapter XI proceedings and are therefore technically a part of the first priority under § 64a (1)."

The Court also ruled that interest accruing on such claims during the arrangement period would also fall within § 64a (1). *Ibid.* See also *Boteler* v. *Ingels,* 308 U. S. 57.

that priority is needed to encourage invitees to enter the premises.

The United States argues, however, that each tort claim "must be analyzed in its own context." Apart from the fact that it has been assumed throughout this case that all 147 claimants were on an equal footing and it is not very helpful to suggest here for the first time a rule by which lessees, invitees, and neighbors have different rights, we perceive no distinction: No principle of tort law of which we are aware offers guidance for distinguishing, within the class of torts committed by receivers while acting in furtherance of the business, between those "integral" to the business and those that are not.[12]

We hold that damages resulting from the negligence of a receiver acting within the scope of his authority as receiver give rise to "actual and necessary costs" of a Chapter XI arrangement.

The judgment of the Court of Appeals is reversed, and the case remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

MR. CHIEF JUSTICE WARREN, with whom MR. JUSTICE DOUGLAS joins, dissenting.

In my opinion, the Court has misinterpreted the term "costs and expenses of administration" as intended by

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[12] Compare 3 Collier, Bankruptcy ¶ 62.15:

"Among other expenses incident to conducting a business and therefore allowable as administrative expenditure may be . . . payments on claims for personal injuries inflicted in the operation of a business, rent, insurance, commissions, cost of raw material or merchandise purchased for manufacturing or resale and any other expense ordinarily attendant upon active participation in commercial or industrial life." (Footnotes omitted.)

§ 64a (1) of the Bankruptcy Act and, by deviating from the natural meaning of those words, has given the administrative cost priority an unwarranted application. The effect of the holding in this case is that the negligence of a workman may completely wipe out the claims of all other classes of public and private creditors. I do not believe Congress intended to accord tort claimants such a preference. Accordingly, I would affirm the judgment below.

On other occasions, this Court has observed that "[t]he theme of the Bankruptcy Act is 'equality of distribution' . . . ; and if one claimant is to be preferred over others, the purpose should be clear from the statute." *Nathanson* v. *NLRB*, 344 U. S. 25, 29 (1952); see *Sampsell* v. *Imperial Paper Corp.*, 313 U. S. 215, 219 (1941). More particularly, the Act expressly directs that eligible negligence claims are to share *equally* with the unsecured claims in a pro rata distribution of the debtor's nonexempt assets. Bankruptcy Act §§ 63a (7), 65a, 11 U. S. C. §§ 103 (a)(7), 105 (a). Departing from this statutory scheme, the Court today singles out one class of tort claims for special treatment. After today's decision, the status of a tort claimant depends entirely upon whether he is fortunate enough to have been injured after rather than before a receiver has been appointed. And if the claimant is in the select class, he may be permitted to exhaust the estate to the exclusion of the general creditors as well as of the wage claims and government tax claims for which Congress has shown an unmistakable preference.[1] In my view, this result frustrates rather

[1] Certain wage claims and government taxes obtain second and fourth priorities respectively under the second and fourth subdivisions of § 64a, 11 U. S. C. §§ 104 (a)(2), 104 (a)(4). The government tax claims in this case, nearly all of which will be excluded from sharing in the estate under today's decision, amount to approximately $245,000.

than serves the underlying purposes of a Chapter XI proceeding, and I would not reach it without a clear indication that Congress so intended.

Congress enacted Chapter XI as an alternative to straight bankruptcy for individuals and small businesses which might be successfully rehabilitated instead of being subjected to economically wasteful liquidation. The success of a Chapter XI proceeding depends largely on two factors: first, whether creditors will take the chance of permitting an arrangement; second, whether other businesses will continue to deal with the distressed business. With respect to the first of these considerations, today's decision will undoubtedly discourage creditors from permitting arrangements, because it subjects them to unpredictable and probably uninsurable tort liability. I do not believe the statutory language requires such an interpretation. I would construe § 64a (1) with reference to the second consideration mentioned above. In my opinion, the Court would reach a result more in line with congressional intent and the Bankruptcy Act generally by regarding as administrative costs only those costs required for a smooth and successful arrangement. Accordingly, the administrative cost priority should be viewed as a guaranty to the receiver and those who deal with or are employed by him that they will be paid for their goods and services. Any broader interpretation will discourage creditors from permitting use of the rehabilitative machinery of Chapter XI and tend to force distressed businesses into straight bankruptcy.

It is equitable, the Court believes, that the general creditors (and wage and tax claimants) bear the loss in this case because they have "thrust" an insolvent business upon petitioner for their own benefit. I respectfully submit that this is a most unfair characterization of arrangements. An economically distressed businessman seeks an arrangement for his own and not for his cred-

itors' benefit.[2] Of course the creditors will benefit if the arrangement is successful, just as they would have benefited if the businessman had been successful without resorting to an arrangement. But a business in arrangement is no more thrust on the public than is any other business enterprise which is conducted for the mutual prosperity of the owners, the wage earners and the creditors. Realistically, the only difference is that a business administered under Chapter XI has not been prosperous. If the arrangement is successful, the owners, wage earners and creditors will all benefit; if it is not, they will all be injured. Thus, I would not distinguish in this case between petitioner and the other general creditors, none of whom was responsible for the catastrophe for which all of them must sustain some loss. Instead, in deciding this case, I would adhere to the Act's basic theme of equality of distribution.

The Court states that its decision will encourage Chapter XI receivers to obtain "adequate" insurance. The Court fairly well concedes, however, that in this case "adequate" insurance "probably could not have been obtained and in any event would have been foolish." In other words, so far as this Court knows, the insurance taken out by the receiver in this case was in fact "adequate," in the sense that no reasonable receiver could or should obtain fire insurance in the amount of $3,500,000 on the assumption that his workman might accidentally cause a fire of the proportions which occurred here. Moreover, quite apart from the case at bar, there is absolutely no indication that today's decision is needed to encourage receivers to obtain insurance.[3] I see no

[2] Unlike straight bankruptcy, only the debtor himself may file a petition for an arrangement under Chapter XI. Bankruptcy Act §§ 321, 322, 11 U. S. C. §§ 721, 722; 8 Collier, Bankruptcy ¶ 4.02 [1].

[3] In fact, the absence of any other adjudicated case on the question here presented is a strong indication that the receiver's insurance is usually perfectly adequate.

basis in the Act or in sound policy for a ruling that the creditors of an estate under a Chapter XI arrangement become involuntary insurers against a liability which probably would not and should not be insurable by more traditional means.

The Court also relies, in my opinion mistakenly, upon analogies to equity receiverships. In reorganizations under Chapter X [4] and § 77,[5] Congress has directed the courts to apply the rules of priority developed in equity.[6] However, arrangements under Chapter XI are governed strictly by the statutory priorities fixed by § 64a. These statutory priorities differ in many respects from those applicable to equity receiverships,[7] and they have been amended repeatedly to narrow the class of claimants which may participate ahead of the general creditors.[8] Furthermore, even in the case of § 77 reorganizations where the priorities developed in equity are controlling, Congress has specifically provided for one exception to the rule that tort claimants are to be treated as general creditors. Bankruptcy Act § 77 (n), 11 U. S. C. § 205 (n).

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[4] 11 U. S. C. §§ 501–676.

[5] 11 U. S. C. § 205.

[6] Bankruptcy Act §§ 77b, 115, 11 U. S. C. §§ 205 (b), 515; see *In re Chicago Express, Inc.*, 332 F. 2d 276, 278 (C. A. 2d Cir. 1964). Section 102 of the Act (11 U. S. C. § 502), which is applicable to corporate reorganizations, specifically provides that § 64 "shall not apply in such proceedings unless an order shall be entered directing that bankruptcy be proceeded with . . . ."

[7] To take but two examples, government tax claims obtain a higher priority in equity receiverships and under Chapter X than they do under § 64a, see Bankruptcy Act § 199, 11 U. S. C. § 599; 6A Collier, Bankruptcy ¶ 9.13 [2]; and the "six-months rule" applied to equity receiverships has no analogue under § 64a. See *Dudley* v. *Mealey*, 147 F. 2d 268 (C. A. 2d Cir. 1945).

[8] *E. g.*, compare Act of July 1, 1898, c. 541, § 64a, 30 Stat. 563, with Act of May 27, 1926, c. 406, § 15 [64a], 44 Stat. 666; compare 80 Stat. 270, 11 U. S. C. §§ 35, 104 (a)(4) (1964 ed., Supp. II), with Act of June 22, 1938, c. 575, amending §§ 17a (1), 64a (4), 52 Stat. 851, 874.

That exception is in favor of a narrowly defined class of claimants. Congress has not expressly provided a similar exception to cover petitioner's tort claim, and I would not infer one.

Finally, the Court concludes, for two reasons, that it is "linguistically more comfortable" to treat petitioner's claim as an administrative cost rather than as a negligence claim which could have been proven under § 63a (7). First, § 63a refers to provable claims against the debtor and not against his estate. Second, §§ 63a (7) and 302 require that an action be commenced on the claim before the filing of the arrangement petition, and allowing claims like petitioner's would in effect toll the time limitation imposed by these sections. With respect to the first of the Court's reasons, I find no statutory or practical basis for distinguishing between the debtor and his estate in this case. Had the arrangement been successful, the debtor would have been liable for any damages occasioned during the administration under the line of cases relied upon by the Court. *Texas & Pacific R. Co.* v. *Bloom,* 164 U. S. 636 (1897). The suggested distinction between "debtor" and "estate" would be meaningful only if the two words pointed to different sources of liability. Here, petitioner's negligence claim, if allowed, would diminish the debtor's estate irrespective of whether it were treated as an administrative cost under § 64a or as an ordinary negligence claim under § 63a (7). With respect to the Court's second argument, Chapter XI provides that the straight bankruptcy provisions, including § 63a (7), are applicable to arrangement proceedings only "so far as possible." Bankruptcy Act § 378 (2), 11 U. S. C. § 778 (2). I have no difficulty in concluding that, where the claim does not arise until after the arrangement petition is filed, it is manifestly impossible for a lawsuit on that claim to precede the filing of the petition. Further, I know

of no more complete way to "read the time limitation out of § 63a (7) of the Act" than by treating certain negligence claims as administrative costs as the Court does in this case.

I see no basis in equity or in the statutory language or purpose for subjecting every class of creditors except petitioner's to a loss caused by the negligence of a workman. Consequently, I would construe "actual and necessary costs" as limited to those costs actually and necessarily incurred in preserving the debtor's estate and administering it for the benefit of the creditors. I would not include ordinary negligence claims within this class.

WIRTZ, SECRETARY OF LABOR *v.* HOTEL, MOTEL & CLUB EMPLOYEES UNION, LOCAL 6.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 891. Argued April 29, 1968.—Decided June 3, 1968.

Petitioner, Secretary of Labor, charged that respondent union's bylaw which limited eligibility for major elective offices to union members who hold or have previously held elective office was not a reasonable qualification under § 401 (e) of Title IV of the Labor-Management Reporting and Disclosure Act of 1959, and that enforcement of the bylaw "may have affected the outcome" of the election within the meaning of § 402 (c). The union has 27,000 members, 93% of whom were ineligible to run for major office because of the bylaw. The restriction did not apply to vacancies filled by appointment. The District Court held the prior-office requirement unreasonable, but in view of the substantial defeat of opposition candidates who did run, lack of evidence that those disqualified were proven vote-getters, lack of substantial grievance against the incumbents, and the overwhelming advantage of the incumbent group in having a full slate of candidates, did not find that enforcement of the bylaw "may have affected the outcome" of the election. The court refused to set aside the election but granted an injunction against enforcement of the bylaw in future elections. The Court of Appeals reversed that part of the judgment declaring the bylaw not to be reasonable and set aside the injunction. *Held:*

1. The bylaw, measured against the Act's requirement of "free and democratic" union elections, is not a "reasonable qualification" within the meaning of § 401 (e) of the Act. Pp. 496–505.

(a) A limitation on candidacy for major office which renders 93% of the union members ineligible can hardly be a "reasonable qualification." P. 502.

(b) The restriction cannot be supported by the argument that the union enjoyed enlightened and aggressive leadership, since Congress designed Title IV of the Act to curb the possibility of abuse by benevolent as well as malevolent entrenched leaderships. P. 503.

(c) The bylaw, virtually unique in union practice, is based on the undemocratic assumption that union members are unable to select qualified candidates for particular offices without a demonstration of performance in other offices. Pp. 504–505.

2. A proved violation of § 401 establishes a prima facie case that the outcome may have been affected and may be met by evidence supporting a finding to the contrary. The factors the District Court relied on were pure conjecture and none of those factors is tangible evidence against the reasonable possibility that the wholesale exclusion of members did affect the outcome. Pp. 505–509.

381 F. 2d 500, reversed and remanded.

Harris Weinstein argued the cause for petitioner. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Weisl, Louis F. Claiborne, Alan S. Rosenthal, Robert V. Zener, Charles Donahue, George T. Avery,* and *Beate Bloch.*

Sidney E. Cohn argued the cause for respondent. With him on the briefs was *Jerome B. Lurie.*

Laurence Gold argued the cause for the American Federation of Labor and Congress of Industrial Organizations, as *amicus curiae,* urging affirmance. With him on the brief were *J. Albert Woll* and *Thomas E. Harris.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This action was brought by petitioner, the Secretary of Labor, in the District Court for the Southern District of New York for a judgment declaring void the May 1965 election of officers conducted by respondent Local 6, and ordering a new election under the Secretary's supervision. The action is authorized by § 402 (b) of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 534, 29 U. S. C. § 482 (b). The Secretary charged that a bylaw of the Local which limited eligibility for major elective offices to union members who

hold or have previously held elective office [1] was not a "reasonable qualification" within the intendment of the provision of § 401 (e) of the Act, 29 U. S. C. § 481 (e), that "every member in good standing shall be eligible to be a candidate and to hold office (subject to . . . reasonable qualifications uniformly imposed) . . . ." [2] He charged further that enforcement of the bylaw "may have affected the outcome" of the election within the meaning of § 402 (c), 29 U. S. C. § 482 (c).[3]

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[1] The bylaw provided:

"In order to be eligible for nomination as an officer, a candidate must possess the following qualifications: (1) He must be a member of the Union in continuous good standing for a period of two years immediately preceding his nomination; (2) He must be a member of either the Assembly or the Executive Board, or else, at some time in the past, have served at least one term on either the Executive Board, the Assembly, or the old Shop Delegates Council. In order to be eligible for nomination as a member of the Executive Board, as a delegate to the Assembly, or as a department delegate, a candidate must be a member of the Union in continuous good standing for a period of at least one year immediately preceding his nomination."

[2] Section 401 (e) provides in pertinent part:

"In any election required by this section which is to be held by secret ballot a reasonable opportunity shall be given for the nomination of candidates and every member in good standing shall be eligible to be a candidate and to hold office (subject to section 504 of this title and to reasonable qualifications uniformly imposed) and shall have the right to vote for or otherwise support the candidate or candidates of his choice, without being subject to penalty, discipline, or improper interference or reprisal of any kind by such organization or any member thereof. . . ." 29 U. S. C. § 481 (e).

[3] Section 402 (c) provides:

"If, upon a preponderance of the evidence after a trial upon the merits, the court finds—

. . . . . .

"(2) that the violation of section 481 of this title may have affected the outcome of an election, the court shall declare the election, if any, to be void and direct the conduct of a new election

The District Court, after hearing, entered a judgment which declared that the prior-office requirement was not reasonable, but also declared that it could not be found that its enforcement in violation of § 401 (e) "may have affected the outcome" of the election. The court therefore refused to set aside the May 1965 election and to order a new election under the Secretary's supervision, but did grant an injunction against enforcement of the bylaw in future elections. 265 F. Supp. 510. The Court of Appeals for the Second Circuit reversed the provision of the judgment which declared the bylaw not to be reasonable and its enforcement violative of § 401 (e), and set aside the injunction.[4] The court found it unnecessary in that circumstance to decide whether enforcement of the bylaw at the election may have affected the outcome. 381 F. 2d 500. We granted certiorari. 390 U. S. 919. We hold that the restriction was not reasonable and that its enforcement may have affected the outcome of the election. The Secretary is therefore entitled to an order directing a new election under his supervision.

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under supervision of the Secretary and, so far as lawful and practicable, in conformity with the constitution and bylaws of the labor organization. . . ." 29 U. S. C. § 482 (c).

[4] Judge Dimock dissented from the reversal of the declaratory judgment but concurred in the setting aside of the injunction. However, he did not join the majority in holding that the District Court was without power to enjoin future violations; his concurrence was "based upon the Secretary's concession of lack of power in the district court." 381 F. 2d, at 507. This issue is not before us.

The District Court did not consider other violations alleged in the complaint because no member of Local 6 had first invoked union remedies to redress them pursuant to § 402 (a). In light of our decision we need not consider the Secretary's argument that a member's protest triggers a § 402 enforcement action in which the Secretary may challenge any violation of § 401 discovered in his investigation of the member's complaint and brought to the attention of the union. Cf. *Wirtz* v. *Local 125, Laborers' Int'l Union*, 389 U. S. 477, 481–482.

I.

Title IV is one of the seven titles of the Labor-Management Reporting and Disclosure Act (LMRDA). Earlier this Term, we observed that "Title IV's special function in furthering the overall goals of the LMRDA is to insure 'free and democratic' elections. The legislative history shows that Congress weighed how best to legislate against revealed abuses in union elections without departing needlessly from its long-standing policy against unnecessary governmental intrusion into internal union affairs." *Wirtz* v. *Local 153, Glass Bottle Blowers Assn.*, 389 U. S. 463, 470–471. The Court of Appeals, however, in considering the reasonableness of the bylaw, emphasized only the congressional concern not to intervene unnecessarily in internal union affairs, stating that "[i]n deciding the issue of reasonableness we must keep in mind the fact that the Act did not purport to take away from labor unions the governance of their own internal affairs and hand that governance over either to the courts or to the Secretary of Labor. The Act strictly limits official interference in the internal affairs of unions." 381 F. 2d, at 504. But this emphasis overlooks the fact that the congressional concern to avoid unnecessary intervention was balanced against the policy expressed in the Act to protect the public interest by assuring that union elections would be conducted in accordance with democratic principles. As we said in *Wirtz* v. *Bottle Blowers, supra,* at 473, decided after the Court of Appeals decided this case, ". . . Congress, although committed to minimal intervention, was obviously equally committed to making that intervention, once warranted, effective in carrying out the basic aim of Title IV." Thus, "the freedom allowed unions to run their own elections was reserved for those elections which conform to the democratic prin-

ciples written into § 401." *Id.*, at 471. In a companion case, *Wirtz* v. *Local 125, Laborers' Int'l Union*, 389 U. S. 477, 483, we said that the provisions of § 401 are "necessary protections of the public interest as well as of the rights and interests of union members." In sum, in § 401 ". . . Congress emphatically asserted a vital public interest in assuring free and democratic union elections that transcends the narrower interest of the complaining union member." *Wirtz* v. *Bottle Blowers, supra*, at 475.

A pervasive theme in the congressional debates about the election provisions was that revelations of corruption, dictatorial practices and racketeering in some unions investigated by Congress [5] indicated a need to protect the rights of rank-and-file members to participate fully in the operation of their union through processes of democratic self-government, and, through the election process, to keep the union leadership responsive to the membership. This theme is made explicit in the reports of the Labor Committees of both Houses of Congress.[6] It is

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[5] See Report of the Senate Committee on Improper Activities in the Labor or Management Field, S. Rep. No. 1417, 85th Cong., 2d Sess. (1958). See discussion in *Wirtz* v. *Bottle Blowers, supra*, at 469–470.

[6] ". . . Like other American institutions some unions have become large and impersonal; they have acquired bureaucratic tendencies and characteristics; their members like other Americans have sometimes become apathetic in the exercise of their personal responsibility for the conduct of union affairs. . . .

". . . [E]ffective measures to stamp out crime and corruption and guarantee internal union democracy, cannot be applied to all unions without the coercive powers of government . . . .

". . . Union members have a vital interest . . . in the policies and conduct of union affairs. To the extent that union procedures are democratic they permit the individual to share in the formulation of union policy. This is not to say that in order to have democratically responsive unions, it is necessary to have each union

reflected in the discrete provisions of Title IV and also of Title I, the "Bill of Rights" for union members. 29 U. S. C. § 411. Title IV, and particularly § 401, was the vehicle by which Congress expressed its policy. That section prescribes standards to govern the conduct of union elections: International union elections must be held at least once every five years and local elections at least once every three years. Elections must be by secret ballot. Specific provisions insure equality of treatment in the mailing of campaign literature; require adequate safeguards to insure a fair election; guarantee a "reasonable opportunity" for the nomination of candidates, the right to vote, and the right of every member in good standing to be a candidate subject to "reasonable qualifications uniformly imposed," the guarantee with which we are concerned in this case. 29 U. S. C. §§ 481 (a)–(e). Furthermore, although Congress emphatically gave unions the primary responsibility for enforcing compliance with the Act, Congress also settled enforcement authority on the Secretary of Labor to insure that serious violations would not go unremedied and the public interest

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member make decisions on detail as in a New England town meeting. What is required is the opportunity to influence policy and leadership by free and periodic elections.

. . . . . .

"It needs no argument to demonstrate the importance of free and democratic union elections. . . . The Government which gives unions . . . power has an obligation to insure that the officials who wield it are responsive to the desires of the men and women whom they represent. The best assurance which can be given is a legal guaranty of free and periodic elections. The responsiveness of union officers to the will of the members depends upon the frequency of elections, and an honest count of the ballots. Guaranties of fairness will preserve the confidence of the public and the members in the integrity of union elections." S. Rep. No. 187, 86th Cong., 1st Sess., 6–7, 20 (1959); I Leg. Hist. 402–403, 416. And see H. R. Rep. No. 741, 86th Cong., 1st Sess., 6–7, 15–16 (1959); I Leg. Hist. 764–765, 773–774.

go unvindicated. See *Wirtz* v. *Bottle Blowers, supra; Wirtz* v. *Laborers' Union, supra; Calhoon* v. *Harvey,* 379 U. S. 134.[7]

Congress plainly did not intend that the authorization in § 401 (e) of "reasonable qualifications uniformly imposed" should be given a broad reach. The contrary is implicit in the legislative history of the section and in its wording that "every member in good standing shall be eligible to be a candidate and to hold office . . . ." This conclusion is buttressed by other provisions of the Act which stress freedom of members to nominate candidates for office.[8] Unduly restrictive candidacy qualifications can result in the abuses of entrenched leadership that the LMRDA was expressly enacted to curb. The check of democratic elections as a preventive measure is seriously impaired by candidacy qualifications which substantially deplete the ranks of those who might run in opposition to incumbents.

It follows therefore that whether the Local 6 bylaw is a "reasonable qualification" within the meaning of § 401 (e) must be measured in terms of its consistency with the Act's command to unions to conduct "free and democratic" union elections.

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[7] See, *e. g.,* S. Rep. No. 187, *supra,* n. 6, at 34; H. R. Rep. No. 741, *supra,* n. 6, at 26–27; I Leg. Hist. 430, 784–785.

For the general background and legislative history of the Act, see generally Aaron, The Labor-Management Reporting and Disclosure Act of 1959, 73 Harv. L. Rev. 851 (1960); Cox, Internal Affairs of Labor Unions Under the Labor Reform Act of 1959, 58 Mich. L. Rev. 819 (1960); Levitan & Loewenberg, The Politics and Provisions of the Landrum-Griffin Act, in Regulating Union Government 28 (M. Estey, P. Taft, & M. Wagner eds. 1964); Rezler, Union Elections: The Background of Title IV of LMRDA, in Symposium on LMRDA 475 (R. Slovenko ed. 1961).

[8] See 29 U. S. C. § 481 (e): "a reasonable opportunity shall be given for the nomination of candidates . . ."; *id.,* § 411 (a)(1): "Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates . . . ."

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II.

Local 6 has 27,000 members, assets of $2,300,000, and assets in welfare, pension, and medical funds of some $30,000,000. The Local represents bartenders, maids, dining room employees, and kitchen employees of hotels, motels, and private clubs in New York. It is structured into six geographic districts, each with five craft departments, for hotel and motel employees, and a seventh district for private clubs. The various crafts have their own representatives in each hotel, motel, or club. An Assembly, composed in 1965 of 372 members, meets four times a year and is the basic representative body. The delegates are elected from among the craft units within each of the seven districts on the basis of one delegate for each 75 members of a craft. The Assembly in turn elects from its membership an Executive Board on the basis of one board member for each 500 members, augmented by principal officers and by nonvoting business agents, 31 of whom are elected from the seven districts and others who are appointed by the Assembly. The Executive Board meets monthly. There is also an Administrative Board made up of, in addition to general officers, seven district vice-presidents elected from the districts and elected or appointed delegates to the New York Hotel and Motel Trades Council. Finally there are four paid full-time general officers—President, Secretary-Treasurer, General Organizer, and Recording Secretary, all elected by the membership at large. Terms of office are three years. In practice the affairs of the Local are administered by the general officers and the Administrative Board.

The bylaw under challenge [9] limited eligibility for positions as a general officer, district vice-president or elected

[9] The Local has amended its bylaw to liberalize the candidacy requirements (making eligible department delegates and members of

business agent to members of either the Assembly or the Executive Board or members who, "at some time in the past, have served at least one term on either the Executive Board, the Assembly, or the old Shop Delegates Council." The Shop Delegates Council was abolished in 1951 and replaced by the Assembly. These qualifications apply, however, only to members who stand for election for office. Vacancies may not always be filled by election; the general officers may in such cases fill vacancies by appointment of members without prior office-holding experience, with the approval of the Executive Board and the Assembly.

By the terms of the bylaw, in the May 1965 election only 1,725 of the 27,000 members were eligible to run for office. Of these, 1,182, or 70%, were eligible only because of service on the Shop Delegates Council which had been abolished 14 years earlier. Thus, only 543 of the eligibles, some 2% of the membership, had at some time or other served at least a term in the Assembly, designated in the bylaws as "the highest body of the Union," since its creation in 1951.

Five elections were held between 1951 and 1965. All of them were won by the "Administration Party," whose slates were composed largely of incumbents. Until the May 1965 election there was only token opposition to those slates. Early in 1965, however, a "Membership Party" was organized. It attempted to field a slate of candidates to oppose the "Administration Party" slate for, among others, the four general offices and for 13 of the 27 vice-president and business agent posts. But

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five years' good standing) and the amended bylaw was to govern an election scheduled for May 16, 1968. The District Court held the amended bylaw also unreasonable, but that ruling is not before us. 265 F. Supp., at 522–523. In any event, respondent's argument that the amendment renders this case moot is foreclosed by *Wirtz* v. *Bottle Blowers, supra,* at 475–476. See also *Wirtz* v. *Laborers' Union, supra,* at 479.

enforcement of the bylaw disqualified the "Membership Party" candidates for the general office of Secretary-Treasurer and for eight of the district offices.[10] Other "Membership Party" nominees were disqualified for lack of good standing. In result, the "Membership Party" slate was reduced to candidates for the offices of president, general organizer, and business agent in two districts. The "Administration Party" ran a full slate and elected its candidates by margins up to 7 to 1. Following the election, "Membership Party" members protested the validity of the bylaw and, after unsuccessfully exhausting internal union remedies as required by § 402 (a)(1), filed the complaint with the Secretary of Labor as authorized by that section which in due course led to the Secretary's filing this action.

Plainly, given the objective of Title IV, a candidacy limitation which renders 93% of union members ineligible for office can hardly be a "reasonable qualification." The practical effect of the limitation was described by the District Court:

> "In practice it was not possible to be elected to the Assembly except with the blessing of the Administration Party conferred by selection to run for the Assembly on Row A [of a voting machine]. This was doubtless in large part because there was never a full slate of opposing candidates for the Assembly. The candidates to run on Row A for the Assembly were selected by the incumbent group of officers and were put in nomination after caucuses of invited members, attended by officers. It was only natural that candidates selected to run on Row A for the Assembly would be supporters of the

[10] For example, the "Membership Party" nominee for one of the vice presidencies was a department delegate (or shop steward) who had been active in his district council meetings; but he was ruled ineligible since he had not held office in the Assembly.

administration. All candidates on Row A were pledged to support each other. Dissidents could not be elected to the Assembly. . . .

. . . . . .

"Since 1951 the only way new members could become eligible for office was to win election to the Assembly. But in this period the only candidates which won such election were those who ran on Row A, the administration ticket. The only way to run on Row A was to be selected by the administration. Thus, dissidents could not become eligible to be opposing candidates for office and effective opposition was thus sharply curtailed." 265 F. Supp., at 516, 520.

The Local attempts to defend the restriction as a "reasonable qualification" by citing the concededly impressive record of the "Administration Party" in running the Local's affairs since 1951. There is no reason to doubt that the Local has enjoyed enlightened and aggressive leadership. But that fact does not sustain the Local's burden. Congress designed Title IV to curb the possibility of abuse by benevolent as well as malevolent entrenched leaderships.

The Local also argues that the high annual turnover in membership, the diverse interests of the various craft units and the multimillion-dollar finances of the Local justify the bylaw as a measure to limit the holding of important union offices to those members who have acquired a familiarity with the Local's problems by service in lesser offices. That argument was persuasive with the Court of Appeals, which said:

"[I]t is not self-evident that basic minimum principles of union democracy require that every union entrust the administration of its affairs to untrained and inexperienced rank and file members. . . . It does not seem to us to be surprising

> that the union should hesitate to permit a cook or a waiter or a dishwasher without any training or experience in the management of union affairs to take on responsibility for the complex and difficult problems of administration of this union.
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> . . . . . .
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> "We do not believe that it is unreasonable for a union to condition candidacy for offices of greater responsibility upon a year [*sic*] of the kind of experience and training that a union member will acquire in a position such as that of membership in Local 6's Assembly." 381 F. 2d, at 505.

That argument is not, however, persuasive to us. It assumes that rank-and-file union members are unable to distinguish qualified from unqualified candidates for particular offices without a demonstration of a candidate's performance in other offices. But Congress' model of democratic elections was political elections in this country, and they are not based on any such assumption. Rather, in those elections the assumption is that voters will exercise common sense and judgment in casting their ballots. Local 6 made no showing that citizens assumed to make discriminating judgments in public elections cannot be relied on to make such judgments when voting as union members. Indeed the Local is not faithful to its own premise. A member need not have prior service in union office to be *appointed* to a vacancy in any office. Also, many members of the powerful Administrative Board become such by reason of their *appointments* as delegates to the New York Hotel and Motel Trades Council, another example of important officers who are not required to have had prior service. Moreover, as the District Court found, "once such an officer is appointed, he automatically becomes a member of the Assembly and immediately becomes eligible to run thereafter for any union office. This enables the incumbent

group to qualify members for elective office by a procedure not available to dissidents." 265 F. Supp., at 520.

The bylaw is virtually unique in trade union practice. It has its counterpart in some other locals of this International Union but not in all; and it is not a requirement included in the International's constitution. Among other large unions only the International Ladies Garment Workers Union has a similar restriction, but that union provides members with the alternative of a union-conducted course in union management. Of 66 unions reporting receipts over $1,000,000 for 1964, only locals of ILGWU and Local 6 reported having this requirement.

Control by incumbents through devices which operate in the manner of this bylaw is precisely what Congress legislated against in the LMRDA. Cf. *Wirtz* v. *Bottle Blowers, supra,* at 474–475. Accordingly, we hold that the bylaw is not a "reasonable qualification" within the meaning of § 401 (e).

III.

The Secretary was not entitled to an order for a supervised election unless the enforcement of the bylaw "may have affected" the outcome of the May 1965 election, § 402 (c), 29 U. S. C. § 482 (c). The "may have affected" language appeared in the bill passed by the Senate, S. 1555.[11] The bill passed by the House, H. R. 8342,

[11] Senator Kennedy had introduced, and the Senate had passed, similar legislation in the 85th Congress which died in the House. Senator Kennedy's bill, S. 3751, included the "may have affected" language. In introducing the measure, he noted that "[i]f the United States District Court agrees with the Secretary, that there has been a *substantial* violation of the provisions of the bill, then he shall void the election . . . ." 104 Cong. Rec. 7954. (Emphasis supplied.) The Senate-passed version, S. 3974, retained the language and the report on the bill said this:

"Since an election is not to be set aside for technical violations but only if there is reason to believe that the violation has *probably* affected the outcome of the election, the Secretary would not file

and the Kennedy-Ervin bill introduced in the Senate, S. 505, required the more stringent showing that the violation actually "affected" the outcome. The difference was resolved in conference by the adoption of the "may have affected" language.[12] Senator Goldwater explained,

> "The Kennedy-Ervin bill (S. 505), as introduced, authorized the court to declare an election void only if the violation of section 401 actually affected the outcome of the election rather than may have affected such outcome. The difficulty of proving such an actuality would be so great as to render the professed remedy practically worthless. Minority members in committee secured an amendment correcting this glaring defect and the amendment is contained in the conference report." 105 Cong. Rec. 19765.

The provision that the finding should be made "upon a preponderance of the evidence" was left undisturbed when the change was made. That provision is readily satisfied, however, as is the congressional purpose in changing "affected" to "may have affected" in order to avoid rendering the proposed "remedy practically worthless," by ascribing to a proved violation of § 401 the effect

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a complaint unless there were also probable cause to believe that this condition was satisfied. . . . After a hearing on the merits the court would determine whether a violation had occurred which might have affected the outcome of an election." S. Rep. No. 1684, 85th Cong., 2d Sess., 13 (1958). (Emphasis supplied.)

Why Senator Kennedy modified the language in S. 505 is not explained.

[12] The Conference Report noted the change as follows:

"In subsection (c) of section 402, the conference substitute adopts the provision of the Senate bill that directs the court to set aside an election if the violation 'may have' affected the outcome. Under the House amendment an election could be set aside only if the violation did affect the outcome." H. R. Conf. Rep. No. 1147, 86th Cong., 1st Sess., 35 (1959); I Leg. Hist. 939.

of establishing a prima facie case that the violation "may have affected" the outcome. This effect may of course be met by evidence which supports a finding that the violation did not affect the result. This construction is peculiarly appropriate when the violation of § 401, as here, takes the form of a substantial exclusion of candidates from the ballot. In such case we adopt the reasoning of the Court of Appeals for the Second Circuit in *Wirtz* v. *Local Union 410, IUOE*, 366 F. 2d 438, 443:

> "The proviso was intended to free unions from the disruptive effect of a voided election unless there is a meaningful relation between a violation of the Act and results of a particular election. For example, if the Secretary's investigation revealed that 20 percent of the votes in an election had been tampered with, but that all officers had won by an 8–1 margin, the proviso should prevent upsetting the election. . . . But in the cases at bar, the alleged violations caused the exclusion of willing candidates from the ballots. In such circumstances, there can be no tangible evidence available of the effect of this exclusion on the election; whether the outcome would have been different depends upon whether the suppressed candidates were potent vote-getters, whether more union members would have voted had candidates not been suppressed, and so forth. Since any proof relating to effect on outcome must necessarily be speculative, we do not think Congress meant to place as stringent a burden on the Secretary as the district courts imposed here."

The District Court acknowledged that the issue was "governed by the teaching of Wirtz v. Local Unions 410, etc." and correctly held that under its principle "a violation by disqualification of candidates does not automatically require a finding that the outcome may have

been affected." 265 F. Supp., at 520–521. We cannot make out from the court's opinion, however, whether the violation was regarded as establishing a prima facie case that the outcome was affected. But if we assume that the court accorded the violation that effect, we disagree with its conclusion that the evidence met that case. The court cited the substantial defeat of those "Membership Party" candidates who did run, the lack of evidence that any of the disqualified nominees was a proven vote-getter, the lack of a substantial grievance or issue asserted by the "Membership Party" against the incumbents, and the overwhelming advantage enjoyed by the "Administration Party" of having a full slate of candidates. 265 F. Supp., at 521. We do not think that these considerations constitute proof supporting the court's conclusion. None of the factors relied on is tangible evidence against the reasonable possibility that the wholesale exclusion of members did affect the outcome. Nothing in them necessarily contradicts the logical inference that some or all of the disqualified candidates might have been elected had they been permitted to run. The defeat suffered by the few candidates allowed to run proves nothing about the performance that might have been made by those who did not. The District Court properly perceived that the bylaw necessarily inhibited the membership generally from considering making the race, but held that any inference from this was disproved by "the heavy vote in favor of the administration candidates . . . ." *Ibid.* But since 93% of the membership was ineligible under the invalid bylaw, it is impossible to know that the election would not have attracted many more candidates but for the bylaw. In short, the considerations relied on by the court are pure conjecture, not evidence. We therefore conclude that the prima facie case established by the

violation was not met by evidence which supports the District Court's finding that the violation did not affect the result.

The judgment of the Court of Appeals is reversed and the case is remanded to the District Court with direction to order a new election under the Secretary's supervision.

It is so ordered.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

WITHERSPOON *v.* ILLINOIS ET AL.

CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

No. 1015. Argued April 24, 1968.—Decided June 3, 1968.

Petitioner was adjudged guilty of murder and the jury fixed his penalty at death. An Illinois statute provided for challenges for cause in murder trials "of any juror who shall, on being examined, state that he has conscientious scruples against capital punishment, or that he is opposed to the same." At petitioner's trial the prosecution, under that statute, eliminated nearly half the venire of prospective jurors by challenging all who expressed qualms about the death penalty. Most of the veniremen thus challenged for cause were excluded with no effort to find out whether their scruples would invariably compel them to vote against capital punishment. The Illinois Supreme Court denied post-conviction relief. *Held:*

1. Neither on the basis of the record in this case nor as a matter of judicial notice of presently available information can it be concluded that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction. Pp. 516–518.

2. Although it has not been shown that this jury was biased with respect to guilt, it is self-evident that, in its distinct role as arbiter of the punishment to be imposed, this jury fell woefully short of that impartiality to which a defendant is entitled under the Sixth and Fourteenth Amendments. P. 518.

3. A man who opposes the death penalty, no less than one who favors it, can make the discretionary choice of punishment entrusted to him by the State and can thus obey the oath he takes as a juror; but in a nation where so many have come to oppose capital punishment, a jury from which all such people have been excluded cannot perform the task demanded of it—that of expressing the conscience of the community on the ultimate question of life or death. P. 519.

4. Just as a State may not entrust the determination of whether a man is innocent or guilty to a tribunal organized to convict, so it may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death; and no sentence of death can be carried out, regardless of when

it was imposed, if the *voir dire* testimony indicates that the jury that imposed or recommended that sentence was chosen by excluding veniremen for cause simply because they voiced general objections to capital punishment or expressed conscientious or religious scruples against its infliction. Pp. 521–523.

36 Ill. 2d 471, 224 N. E. 2d 259, reversed.

Albert E. Jenner, Jr., argued the cause for petitioner. With him on the briefs were *Thomas P. Sullivan, Jerold S. Solovy,* and *John C. Tucker.*

Donald J. Veverka, Assistant Attorney General, argued the cause for respondent State of Illinois. With him on the brief were *William G. Clark,* Attorney General, and *John J. O'Toole,* Assistant Attorney General. *James B. Zagel* argued the cause for respondent Woods, *pro hac vice.* With him on the brief were *John J. Stamos, Elmer C. Kissane,* and *Joel Flaum.*

Robert R. Granucci, Deputy Attorney General, argued the cause for the State of California, as *amicus curiae.* With him on the brief were *Thomas C. Lynch,* Attorney General, *Albert W. Harris, Jr.*, Assistant Attorney General, and *George R. Nock,* Deputy Attorney General, joined by the Attorneys General for their respective States as follows: *MacDonald Gallion* of Alabama, *Darrell F. Smith* of Arizona, *Joe Purcell* of Arkansas, *Duke W. Dunbar* of Colorado, *David P. Buckson* of Delaware, *Earl Faircloth* of Florida, *Arthur K. Bolton* of Georgia, *Allan G. Shepard* of Idaho, *Robert C. Londerholm* of Kansas, *John B. Breckinridge* of Kentucky, *Jack P. F. Gremillion* of Louisiana, *Norman H. Anderson* of Missouri, *Clarence A. H. Meyer* of Nebraska, *George S. Pappagianis* of New Hampshire, *Boston E. Witt* of New Mexico, *Helgi Johanneson* of North Dakota, *William B. Saxbe* of Ohio, *G. T. Blankenship* of Oklahoma, *William C. Sennett* of Pennsylvania, *Daniel R. McLeod* of South Carolina, *Frank L. Farrar* of South Dakota, *George F. McCanless* of Tennessee, *Crawford C. Martin* of Texas,

Robert Y. Button of Virginia, *John J. O'Connell* of Washington, and *James E. Barrett* of Wyoming; and by *Marion O. Gordon*, Assistant Attorney General of Georgia, *Frank P. Lawley*, Deputy Attorney General of Pennsylvania, *Reno S. Harp III*, Assistant Attorney General of Virginia, and *Howard L. McFadden*.

Briefs of *amici curiae* were filed by *Elmer Gertz* for the Illinois Division, American Civil Liberties Union; by *Jack Greenberg, James M. Nabrit III, Michael Meltsner, Leroy D. Clark, Norman C. Amaker*, and *Charles S. Ralston* for the NAACP Legal Defense and Educational Fund, Inc., et al.; by *Alex Elson, Willard J. Lassers*, and *Marvin Braiterman* for the American Friends Service Committee et al.; by *F. Lee Bailey, pro se;* by *Joel W. Westbrook* for Turner, and by *John P. Frank* and *John J. Flynn* for Madden.

MR. JUSTICE STEWART delivered the opinion of the Court.

The petitioner was brought to trial in 1960 in Cook County, Illinois, upon a charge of murder. The jury found him guilty and fixed his penalty at death. At the time of his trial an Illinois statute provided:

> "In trials for murder it shall be a cause for challenge of any juror who shall, on being examined, state that he has conscientious scruples against capital punishment, or that he is opposed to the same." [1]

Through this provision the State of Illinois armed the prosecution with unlimited challenges for cause in order

[1] Ill. Rev. Stat., c. 38, § 743 (1959). The section was re-enacted in 1961 but was not expressly repeated in the Code of Criminal Procedure of 1963. Ill. Rev. Stat., c. 38, § 115–4 (d) (1967) now provides only that "[e]ach party may challenge jurors for cause," but the Illinois Supreme Court has held that § 115–4 (d) incorporates former § 743. *People* v. *Hobbs*, 35 Ill. 2d 263, 274, 220 N. E. 2d 469, 475.

to exclude those jurors who, in the words of the State's highest court, "might hesitate to return a verdict inflicting [death]." [2] At the petitioner's trial, the prosecution eliminated nearly half the venire of prospective jurors by challenging, under the authority of this statute, any venireman who expressed qualms about capital punishment. From those who remained were chosen the jurors who ultimately found the petitioner guilty and sentenced him to death. The Supreme Court of Illinois denied post-conviction relief,[3] and we granted certiorari [4] to decide whether the Constitution permits a State to execute a man pursuant to the verdict of a jury so composed.

I.

The issue before us is a narrow one. It does not involve the right of the prosecution to challenge for cause those prospective jurors who state that their reservations about capital punishment would prevent them from making an impartial decision as to the defendant's guilt.[5] Nor does it involve the State's assertion of a

[2] "In the trial of the case where capital punishment may be inflicted a juror who has religious or conscientious scruples against capital punishment *might hesitate to return a verdict inflicting such punishment,* and in the present proceedings [a post-sentence sanity hearing] a juror having such scruples might likewise hesitate in returning a verdict finding [the defendant] sane, which in effect confirms the death sentence." *People* v. *Carpenter,* 13 Ill. 2d 470, 476, 150 N. E. 2d 100, 103. (Emphasis added.)

[3] 36 Ill. 2d 471, 224 N. E. 2d 259.

[4] 389 U. S. 1035.

[5] Unlike the statutory provision in this case, statutes and rules disqualifying jurors with scruples against capital punishment are often couched in terms of reservations against finding a man *guilty* when the penalty might be death. See, *e. g.,* Cal. Penal Code, § 1074, subd. 8. Yet, despite such language, courts in other States have sometimes permitted the exclusion for cause of jurors opposed to the death penalty even in the absence of a showing that their scruples would have interfered with their ability to determine

right to exclude from the jury in a capital case those who say that they could never vote to impose the death penalty or that they would refuse even to consider its imposition in the case before them. For the State of Illinois did not stop there, but authorized the prosecution to exclude as well all who said that they were opposed to capital punishment and all who indicated that they had conscientious scruples against inflicting it.

In the present case the tone was set when the trial judge said early in the *voir dire*, "Let's get these conscientious objectors out of the way, without wasting any time on them." In rapid succession, 47 veniremen were successfully challenged for cause on the basis of their attitudes toward the death penalty. Only five of the 47 explicitly stated that under no circumstances would they vote to impose capital punishment.[6] Six said that they did not "believe in the death penalty" and were excused without any attempt to determine whether they could nonetheless return a verdict of death.[7] Thirty-

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guilt in accordance with the evidence and the law. See, *e. g.*, *State* v. *Thomas*, 78 Ariz. 52, 58, 275 P. 2d 408, 412; *People* v. *Nicolaus*, 65 Cal. 2d 866, 882, 423 P. 2d 787, 798; *Piccott* v. *State*, 116 So. 2d 626, 628 (Fla.); *Commonwealth* v. *Ladetto*, 349 Mass. 237, 246, 207 N. E. 2d 536, 542; *State* v. *Williams*, 50 Nev. 271, 278, 257 P. 619, 621; *Smith* v. *State*, 5 Okla. Cr. 282, 284, 114 P. 350, 351; *State* v. *Jensen*, 209 Ore. 239, 281, 296 P. 2d 618, 635; *State* v. *Leuch*, 198 Wash. 331, 333–337, 88 P. 2d 440, 441–442.

[6] The State stresses the fact that the judge who presided during the *voir dire* implied several times that only those jurors who could *never* agree to a verdict of death should deem themselves disqualified because of their scruples against capital punishment. The record shows, however, that the remarks relied upon by the State were not made within the hearing of every venireman ultimately excused for cause under the statute. On the contrary, three separate venires were called into the courtroom, and it appears that at least 30 of the 47 veniremen eliminated in this case were not even present when the statements in question were made.

[7] It is entirely possible, of course, that even a juror who believes that capital punishment should never be inflicted and who is irrev-

nine veniremen, including four of the six who indicated that they did not believe in capital punishment, acknowledged having "conscientious or religious scruples against the infliction of the death penalty" or against its infliction "in a proper case" and were excluded without any effort to find out whether their scruples would invariably compel them to vote against capital punishment.

Only one venireman who admitted to "a religious or conscientious scruple against the infliction of the death penalty in a proper case" was examined at any length. She was asked: "You don't believe in the death penalty?" She replied: "No. It's just I wouldn't want to be responsible." The judge admonished her not to forget her "duty as a citizen" and again asked her whether she had "a religious or conscientious scruple" against capital punishment. This time, she replied in the negative. Moments later, however, she repeated that she would not "like to be responsible for . . . deciding somebody should be put to death." [8] Evidently satisfied that this elaboration of the prospective juror's views disqualified her under the Illinois statute, the judge told her to "step aside." [9]

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ocably committed to its abolition could nonetheless subordinate his personal views to what he perceived to be his duty to abide by his oath as a juror and to obey the law of the State. See *Commonwealth* v. *Webster*, 59 Mass. 295, 298. See also *Atkins* v. *State*, 16 Ark. 568, 580; *Williams* v. *State*, 32 Miss. 389, 395–396; *Rhea* v. *State*, 63 Neb. 461, 472–473, 88 N. W. 789, 792.

[8] Compare *Smith* v. *State*, 55 Miss. 410, 413–414: "The declaration of the rejected jurors, in this case, amounted only to a statement that they would not like . . . a man to be hung. Few men would. Every right-thinking man would regard it as a painful duty to pronounce a verdict of death upon his fellow-man. . . . For the error in improperly rejecting [these] two members of the special *venire* the case must be reversed."

[9] As the *voir dire* examination of this venireman illustrates, it cannot be assumed that a juror who describes himself as having "conscientious or religious scruples" against the infliction of the

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II.

The petitioner contends that a State cannot confer upon a jury selected in this manner the power to determine guilt. He maintains that such a jury, unlike one chosen at random from a cross-section of the community, must necessarily be biased in favor of conviction, for the kind of juror who would be unperturbed by the prospect of sending a man to his death, he contends, is the kind of juror who would too readily ignore the presumption of the defendant's innocence, accept the prosecution's ver-

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death penalty or against its infliction "in a proper case" (see *People* v. *Bandhauer*, 66 Cal. 2d 524, 531, 426 P. 2d 900, 905) thereby affirms that he could never vote in favor of it or that he would not consider doing so in the case before him. See also the *voir dire* in *Rhea* v. *State*, 63 Neb. 461, 466–468, 88 N. W. 789, 790. Cf. *State* v. *Williams*, 50 Nev. 271, 278, 257 P. 619, 621. Obviously many jurors "could, notwithstanding their conscientious scruples [against capital punishment], return . . . [a] verdict [of death] and . . . make their scruples subservient to their duty as jurors." *Stratton* v. *People*, 5 Colo. 276, 277. Cf. *Commonwealth* v. *Henderson*, 242 Pa. 372, 377, 89 A. 567, 569. Yet such jurors have frequently been deemed unfit to serve in a capital case. See, *e. g.*, *Rhea* v. *State*, *supra*, 63 Neb., at 470–471, 88 N. W., at 791–792. See generally Oberer, Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt?, 39 Tex. L. Rev. 545, 547–548 (1961); Comment, 1968 Duke L. J. 283, 295–299.

The critical question, of course, is not how the phrases employed in this area have been construed by courts and commentators. What matters is how they might be understood—or misunderstood—by prospective jurors. Any "layman . . . [might] say he has scruples if he is somewhat unhappy about death sentences. . . . [Thus] a general question as to the presence of . . . reservations [or scruples] is far from the inquiry which separates those who would never vote for the ultimate penalty from those who would reserve it for the direst cases." *Id.*, at 308–309. Unless a venireman states unambiguously that he would automatically vote against the imposition of capital punishment no matter what the trial might reveal, it simply cannot be assumed that that is his position.

sion of the facts, and return a verdict of guilt. To support this view, the petitioner refers to what he describes as "competent scientific evidence that death-qualified jurors are partial to the prosecution on the issue of guilt or innocence." [10]

The data adduced by the petitioner, however, are too tentative and fragmentary to establish that jurors not opposed to the death penalty tend to favor the prosecution in the determination of guilt.[11] We simply cannot

[10] In his brief, the petitioner cites two surveys, one involving 187 college students, W. C. Wilson, Belief in Capital Punishment and Jury Performance (Unpublished Manuscript, University of Texas, 1964), and the other involving 200 college students, F. J. Goldberg, Attitude Toward Capital Punishment and Behavior as a Juror in Simulated Capital Cases (Unpublished Manuscript, Morehouse College, undated). In his petition for certiorari, he cited a study based upon interviews with 1,248 jurors in New York and Chicago. A preliminary, unpublished summary of the results of that study stated that "a jury consisting only of jurors who have no scruples against the death penalty is likely to be more prosecution prone than a jury on which objectors to the death penalty sit," and that "the defendant's chances of acquittal are somewhat reduced if the objectors are excluded from the jury." H. Zeisel, Some Insights Into the Operation of Criminal Juries 42 (Confidential First Draft, University of Chicago, November 1957).

[11] During the post-conviction proceedings here under review, the petitioner's counsel argued that the prosecution-prone character of "death-qualified" juries presented "purely a legal question," the resolution of which required "no additional proof" beyond "the facts . . . disclosed by the transcript of the voir dire examination . . . ." Counsel sought an "opportunity to submit evidence" in support of several contentions unrelated to the issue involved here. On this issue, however, no similar request was made, and the studies relied upon by the petitioner in this Court were not mentioned. We can only speculate, therefore, as to the precise meaning of the terms used in those studies, the accuracy of the techniques employed, and the validity of the generalizations made. Under these circumstances, it is not surprising that the *amicus curiae* brief filed by the NAACP Legal Defense and Educational Fund finds it necessary to observe that, with respect to bias in favor of the

conclude, either on the basis of the record now before us or as a matter of judicial notice, that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction. In light of the presently available information, we are not prepared to announce a *per se* constitutional rule requiring the reversal of every conviction returned by a jury selected as this one was.

III.

It does not follow, however, that the petitioner is entitled to no relief. For in this case the jury was entrusted with two distinct responsibilities: first, to determine whether the petitioner was innocent or guilty; and second, if guilty, to determine whether his sentence should be imprisonment or death.[12] It has not been shown that this jury was biased with respect to the petitioner's guilt. But it is self-evident that, in its role as arbiter of the punishment to be imposed, this jury fell woefully short of that impartiality to which the petitioner was entitled under the Sixth and Fourteenth Amendments. See *Glasser* v. *United States*, 315 U. S. 60, 84–86; *Irvin* v. *Dowd*, 366 U. S. 717, 722–723; *Turner* v. *Louisiana*, 379 U. S. 466, 471–473.

The only justification the State has offered for the jury-selection technique it employed here is that individuals who express serious reservations about capital punishment cannot be relied upon to vote for it even

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prosecution on the issue of guilt, the record in this case is "almost totally lacking in the sort of factual information that would assist the Court."

[12] At the time of the petitioner's trial, the jury's penalty determination was binding upon the judge. Ill. Rev. Stat., c. 38, §§ 360, 801 (1959). That is no longer the case in Illinois, for the trial judge is now empowered to reject a jury recommendation of death, Ill. Rev. Stat., c. 38, § 1–7 (c)(1) (1967), but nothing in our decision turns upon whether the judge is bound to follow such a recommendation.

when the laws of the State and the instructions of the trial judge would make death the proper penalty. But in Illinois, as in other States,[13] the jury is given broad discretion to decide whether or not death *is* "the proper penalty" in a given case, and a juror's general views about capital punishment play an inevitable role in any such decision.

A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror. But a jury from which all such men have been excluded cannot perform the task demanded of it. Guided by neither rule nor standard, "free to select or reject as it [sees] fit," [14] a jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death.[15] Yet, in a

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[13] See generally H. Kalven & H. Zeisel, The American Jury 435, 444, 448–449 (1966).

[14] *People* v. *Bernette*, 30 Ill. 2d 359, 370, 197 N. E. 2d 436, 443.

[15] It is suggested in a dissenting opinion today that the State of Illinois might "impose a particular penalty, including death, on all persons convicted of certain crimes." *Post*, at 541. But Illinois has attempted no such thing. Nor has it defined a category of capital cases in which "death [is] the *preferred* penalty." *People* v. *Bernette*, *supra*, at 369, 197 N. E. 2d, at 442. (Emphasis added.) Instead, it has deliberately "made . . . the death penalty . . . an optional form of punishment which [the jury remains] free to select or reject as it [sees] fit." 30 Ill. 2d, at 370, 197 N. E. 2d, at 443. And one of the most important functions any jury can perform in making such a selection is to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect "the evolving standards of decency that mark the progress of a maturing society." *Trop* v. *Dulles*, 356 U. S. 86, 101 (opinion of THE CHIEF JUSTICE, joined by MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, and Mr. Justice Whittaker). Cf. n. 19, *infra*.

nation less than half of whose people believe in the death penalty,[16] a jury composed exclusively of such people cannot speak for the community. Culled of all who harbor doubts about the wisdom of capital punishment—of all who would be reluctant to pronounce the extreme penalty—such a jury can speak only for a distinct and dwindling minority.[17]

If the State had excluded only those prospective jurors who stated in advance of trial that they would not even consider returning a verdict of death, it could argue that the resulting jury was simply "neutral" with respect to penalty.[18] But when it swept from the jury all who expressed conscientious or religious scruples against capital punishment and all who opposed it in principle, the State crossed the line of neutrality. In its quest for a

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[16] It appears that, in 1966, approximately 42% of the American public favored capital punishment for convicted murderers, while 47% opposed it and 11% were undecided. Polls, International Review on Public Opinion, Vol. II, No. 3, at 84 (1967). In 1960, the comparable figures were 51% in favor, 36% opposed, and 13% undecided. *Ibid.*

[17] Compare Arthur Koestler's observation:

"The division is not between rich and poor, highbrow and lowbrow, Christians and atheists: it is between those who have charity and those who have not. . . . The test of one's humanity is whether one is able to accept this fact—not as lip service, but with the shuddering recognition of a kinship: here but for the grace of God, drop I." Koestler, Reflections on Hanging 166–167 (1956).

[18] Even so, a defendant convicted by such a jury in some future case might still attempt to establish that the jury was less than neutral with respect to *guilt*. If he were to succeed in that effort, the question would then arise whether the State's interest in submitting the penalty issue to a jury capable of imposing capital punishment may be vindicated at the expense of the defendant's interest in a completely fair determination of guilt or innocence—given the possibility of accommodating both interests by means of a bifurcated trial, using one jury to decide guilt and another to fix punishment. That problem is not presented here, however, and we intimate no view as to its proper resolution.

jury capable of imposing the death penalty, the State produced a jury uncommonly willing to condemn a man to die.[19]

It is, of course, settled that a State may not entrust the determination of whether a man is innocent or guilty to a tribunal "organized to convict." *Fay* v. *New York*, 332 U. S. 261, 294. See *Tumey* v. *Ohio*, 273 U. S. 510. It requires but a short step from that principle to hold, as we do today, that a State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death.[20] Specifically,

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[19] The *amicus curiae* brief filed in this case by the American Friends Service Committee et al. notes that the number of persons under sentence of death in this country climbed from 300 at the end of 1963 to 406 at the end of 1966, while the number of persons actually executed fell from 21 in 1963 to 15 in 1964, seven in 1965, and one in 1966. The brief suggests that this phenomenon might be explained in part by society's "deep reluctance actually to inflict the death sentence" and by a widening "divergence of belief between the juries we select and society generally."

[20] It should be understood that much more is involved here than a simple determination of sentence. For the State of Illinois empowered the jury in this case to answer "yes" or "no" to the question whether this defendant was fit to live. To be sure, such a determination is different in kind from a finding that the defendant committed a specified criminal offense. Insofar as a determination that a man should be put to death might require "that there be taken into account the circumstances of the offense together with the character and propensities of the offender," *Pennsylvania* v. *Ashe*, 302 U. S. 51, 55, for example, it may be appropriate that certain rules of evidence with respect to penalty should differ from the corresponding evidentiary rules with respect to guilt. See, *e. g.*, *Williams* v. *New York*, 337 U. S. 241. But this does not mean that basic requirements of procedural fairness can be ignored simply because the determination involved in this case differs in some respects from the traditional assessment of whether the defendant engaged in a proscribed course of conduct. See, *e. g.*, *Specht* v. *Patterson*, 386 U. S. 605. Cf. *Mempa* v. *Rhay*, 389 U. S. 128.

One of those requirements, at least, is that the decision whether a man deserves to live or die must be made on scales that are not

we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction.[21] No defendant can constitutionally be

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deliberately tipped toward death. It was in part upon such a premise that the Fourth Circuit recently invalidated a North Carolina murder conviction, noting that a juror who felt it his "duty" to sentence *every* convicted murderer to death was allowed to serve in that case, "while those who admitted to scruples against capital punishment were dismissed without further interrogation." This "double standard," the court concluded, "inevitably resulted in [a] denial of due process." *Crawford* v. *Bounds*, 395 F. 2d 297, 303–304 (alternative holding). Cf. *Stroud* v. *United States*, 251 U. S. 15, 20–21; on petition for rehearing, *id.*, at 380, 381 (dictum).

[21] Just as veniremen cannot be excluded for cause on the ground that they hold such views, so too they cannot be excluded for cause simply because they indicate that there are some kinds of cases in which they would refuse to recommend capital punishment. And a prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him. The most that can be demanded of a veniremen in this regard is that he be willing to *consider* all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. If the *voir dire* testimony in a given case indicates that veniremen were excluded on any broader basis than this, the death sentence cannot be carried out even if applicable statutory or case law in the relevant jurisdiction would appear to support only a narrower ground of exclusion. See nn. 5 and 9, *supra*.

We repeat, however, that nothing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to

put to death at the hands of a tribunal so selected.[22]

Whatever else might be said of capital punishment, it is at least clear that its imposition by a hanging jury cannot be squared with the Constitution. The State of Illinois has stacked the deck against the petitioner. To execute this death sentence would deprive him of his life without due process of law.

Reversed.

MR. JUSTICE DOUGLAS.

My difficulty with the opinion of the Court is a narrow but important one. The Court permits a State to eliminate from juries some of those who have conscientious scruples against the death penalty; but it allows those to serve who have no scruples against it as well as those who, having such scruples, nevertheless are deemed able to determine after a finding of guilt whether the death

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the defendant's *guilt*. Nor does the decision in this case affect the validity of any sentence *other* than one of death. Nor, finally, does today's holding render invalid the *conviction*, as opposed to the *sentence*, in this or any other case.

[22] We have considered the suggestion, advanced in an *amicus curiae* brief filed by 27 States on behalf of Illinois, that we should "give prospective application only to any new constitutional ruling in this area," particularly since a dictum in an 1892 decision of this Court approved the practice of challenging for cause those jurors who expressed "conscientious scruples in regard to the infliction of the death penalty for crime." *Logan* v. *United States*, 144 U. S. 263, 298. But we think it clear, *Logan* notwithstanding, that the jury-selection standards employed here necessarily undermined "the very integrity of the . . . process" that decided the petitioner's fate, see *Linkletter* v. *Walker*, 381 U. S. 618, 639, and we have concluded that neither the reliance of law enforcement officials, cf. *Tehan* v. *Shott*, 382 U. S. 406, 417; *Johnson* v. *New Jersey*, 384 U. S. 719, 731, nor the impact of a retroactive holding on the administration of justice, cf. *Stovall* v. *Denno*, 388 U. S. 293, 300, warrants a decision against the fully retroactive application of the holding we announce today.

penalty or a lesser penalty should be imposed. I fail to see or understand the constitutional dimensions of those distinctions.

The constitutional question is whether the jury must be "impartially drawn from a cross-section of the community," or whether it can be drawn with systematic and intentional exclusion of some qualified groups, to use Mr. Justice Murphy's words in his dissent in *Fay* v. *New York*, 332 U. S. 261, 296.

Fay v. *New York*, which involved a conviction of union leaders for extortion, was the "blue ribbon" jury case in which the jury was weighted in favor of propertied people more likely to convict for certain kinds of crimes. The decision was 5–4, Mr. Justice Murphy speaking for MR. JUSTICE BLACK, Mr. Justice Rutledge, and myself:

> "There is no constitutional right to a jury drawn from a group of uneducated and unintelligent persons. Nor is there any right to a jury chosen solely from those at the lower end of the economic and social scale. But there is a constitutional right to a jury drawn from a group which represents a cross-section of the community. And a cross-section of the community includes persons with varying degrees of training and intelligence and with varying economic and social positions. Under our Constitution, the jury is not to be made the representative of the most intelligent, the most wealthy or the most successful, nor of the least intelligent, the least wealthy or the least successful. It is a democratic institution, representative of all qualified classes of people." *Id.*, at 299–300.

The idea that a jury should be "impartially drawn from a cross-section of the community" [1] certainly should not

[1] "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly repre-

mean a selection of only those with a predisposition to impose the severest sentence or with a predisposition to impose the least one that is possible.

The problem is presented in different postures under several types of state laws. Many States, including Illinois, specifically grant the jury discretion as to penalty;[2] in some, this discretion is exercised at a special penalty trial, convened after a verdict of guilt has been returned.[3] In other States, death is imposed upon a conviction of first degree murder unless the jury recommends mercy or life imprisonment,[4] although in these States the jury

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sentative of the community." *Smith* v. *Texas*, 311 U. S. 128, 130. And see *Ballard* v. *United States*, 329 U. S. 187, 191; *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217, 220 ("The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community"); *Glasser* v. *United States*, 315 U. S. 60, 85–86.

[2] Ala. Code, Tit. 14, § 318 (1958); Ariz. Rev. Stat. Ann. § 13–453 (1956); Colo. Rev. Stat. Ann. § 40–2–3 (1963); Haw. Rev. Laws § 291–5 (1955); Idaho Code Ann. § 18–4004 (1948); Ill. Rev. Stat., c. 38, § 1–7 (c)(1) (1967); Ind. Ann. Stat. § 9–1819 (1956); Kan. Stat. Ann. § 21–403 (1964); Ky. Rev. Stat. § 435.010 (1962), Ky. Rule Crim. Proc. 9.84 (1965); Mo. Rev. Stat. § 559.030 (1959); Neb. Rev. Stat. § 28–401 (1964); Nev. Rev. Stat. § 200.030 (1963); Okla. Stat. Ann., Tit. 21, § 707 (1958); Tenn. Code Ann. § 39–2406 (1955); Tex. Pen. Code Ann., Art. 1257 (1961), Tex. Code Crim. Proc., Art. 37.07 (1967 Supp.); Va. Code Ann. §§ 18.1–22, 19.1–291 (1960). In most of these States, a jury decision of death is binding on the court. In a few States, however, the judge may overrule the jury and impose a life sentence. Ill. Rev. Stat., c. 38, § 1–7 (c)(1) (1967); *State* v. *Anderson*, 384 S. W. 2d 591 (Mo. 1964); S. D. Code § 13.2012 (1960 Supp.).

[3] Cal. Pen. Code § 190.1 (1967 Supp.); N. Y. Pen. Law §§ 125.30, 125.35 (1967); Pa. Stat., Tit. 18, § 4701 (1963). And see S. D. Code § 13.2012 (1960 Supp.) (trial court may ask jury to retire to deliberate on penalty after verdict of guilt returned).

[4] Ark. Stat. Ann. §§ 41–2227, 43–2153 (1964); Conn. Gen. Stat. Rev. § 53–10 (1965 Supp.); Del. Code Ann., Tit. 11, §§ 571, 3901

is allowed to find a lesser degree of murder (or to find manslaughter, if under state law there are no degrees of murder), if the evidence will permit, without regard to the formal charge.[5] In some States, the death penalty is

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(1966 Supp.); Fla. Stat. §§ 782.04, 919.23 (1965); Ga. Code Ann. § 26–1005 (1953); La. Rev. Stat. § 14:30 (1950); Md. Ann. Code, Art. 27, § 413 (1967); Mass. Gen. Laws Ann., c. 265, § 2 (1959); Miss. Code Ann. § 2217 (1957); Mont. Rev. Codes Ann. § 94–2505 (1949); N. J. Rev. Stat. § 2A:113–4 (1953); N. M. Stat. Ann. § 40A–29–2 (1953); N. C. Gen. Stat. § 14–17 (1953); Ohio Rev. Code Ann. § 2901.01 (1954); S. C. Code Ann. § 16–52 (1962); Utah Code Ann. § 76–30–4 (1953); Wyo. Stat. Ann. § 6–54 (1959). In two of these States, the court possesses discretion to impose a life sentence despite the failure of the jury to recommend mercy. Ga. Code Ann. § 26–1005 (1953) (if conviction based solely on circumstantial evidence); Md. Ann. Code, Art. 27, § 413 (1967). In Delaware and Utah the court may overrule a jury recommendation of life imprisonment and impose the death penalty. Del. Code Ann., Tit. 11, §§ 571, 3901 (1966 Supp.); Utah Code Ann. § 76–30–4 (1953), *State* v. *Romeo*, 42 Utah 46, 128 P. 530 (1912).

[5] Arkansas: Ark. Stat. Ann. § 43–2152 (1964); Connecticut: Conn. Gen. Stat. Rev. § 53–9 (1965 Supp.); Delaware: *State* v. *Price*, 30 Del. 544, 108 A. 385 (1919); Florida: *Brown* v. *State*, 124 So. 2d 481 (1960); Georgia: (no degrees of murder) *Graham* v. *State*, 34 Ga. App. 598, 130 S. E. 354 (1925); Louisiana: (no degrees of murder) *State* v. *Goodwin*, 189 La. 443, 179 So. 591 (1938); Maryland: Md. Ann. Code, Art. 27, § 412 (1967), and see *Chisley* v. *State*, 202 Md. 87, 95 A. 2d 577 (1953), *Gunther* v. *State*, 228 Md. 404, 179 A. 2d 880 (1962); Massachusetts: *Commonwealth* v. *Kavalauskas*, 317 Mass. 453, 58 N. E. 2d 819 (1945), *Commonwealth* v. *Di Stasio*, 298 Mass. 562, 11 N. E. 2d 799 (1937); Mississippi: (no degrees of murder) *Anderson* v. *State*, 199 Miss. 885, 25 So. 2d 474 (1946); Montana: *State* v. *Le Duc*, 89 Mont. 545, 300 P. 919 (1931), *State* v. *Miller*, 91 Mont. 596, 9 P. 2d 474 (1932); New Jersey: *State* v. *Sullivan*, 43 N. J. 209, 203 A. 2d 177 (1964), *State* v. *Wynn*, 21 N. J. 264, 121 A. 2d 534 (1956); New Mexico: *State* v. *Smith*, 26 N. M. 482, 194 P. 869 (1921); North Carolina: *State* v. *Lucas*, 124 N. C. 825, 32 S. E. 962 (1899); Ohio: *State* v. *Muskus*, 158 Ohio St. 276, 109 N. E. 2d 15 (1952); South Carolina: (no degrees of murder) *State* v. *Byrd*, 72 S. C. 104, 51 S. E. 542 (1905); Utah: *State* v. *Mewhinney*, 43 Utah 135, 134 P. 632 (1913); Wyoming: *Brantley* v. *State*, 9 Wyo. 102, 61 P. 139 (1900).

mandatory for certain types of crimes.[6] In still others, it has been abolished either in whole or in part.[7] And a few States have special rules which do not fit precisely into the above categories.[8]

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[6] Ala. Code, Tit. 14, § 319 (1958) (person serving life term at time of commission of offense); Ariz. Rev. Stat. Ann. § 13–701 (1956) (treason); Mass. Gen. Laws Ann., c. 265, § 2 (1959) (rape murders); Miss. Code Ann. § 2397 (1957) (treason); Ohio Rev. Code Ann. §§ 2901.09, 2901.10 (1954) (murder of President, Vice-President, Governor, or Lieutenant Governor); R. I. Gen. Laws Ann. § 11–23–2 (1956) (person serving life term at time of commission of offense).

[7] Alaska Stat. § 11.15.010 (1962); Iowa Code Ann. § 690.2 (1967 Supp.); Me. Rev. Stat. Ann., Tit. 17, § 2651 (1964); Mich. Stat. Ann. § 28.548, Comp. Laws 1948, § 750.316 (1954); Minn. Stat. § 609.185 (1965); Ore. Rev. Stat. § 163.010 (1967); W. Va. Code Ann. § 61–2–2 (1966); Wis. Stat. § 940.01 (1965). In North Dakota the death penalty has been abolished except in the case of murder committed while under a life sentence for murder, in which case the death penalty may be imposed at the jury's discretion. N. D. Cent. Code §§ 12–27–13, 12–27–22 (1960). Vermont has also abolished the death penalty except in the cases of an unrelated second offense of murder or the killing of a peace officer or prison official, in which cases the death penalty may be imposed at the jury's discretion. Vt. Stat. Ann., Tit. 13, § 2303 (1967 Supp.). In Rhode Island the death penalty has been abolished except that it is mandatory in cases of murder committed while under a life sentence for murder. R. I. Gen. Laws Ann. § 11–23–2 (1956). In Georgia the death penalty may not be imposed if the person convicted was under 17 years of age at the time of the offense. Ga. Code Ann. § 26–1005 (1967 Supp.). In California it may not be imposed if the person was under 18 years of age. Cal. Pen. Code § 190.1 (1967 Supp.). In New York capital punishment has been abolished except that it may be imposed at the jury's discretion in cases of the murder of a peace officer while in the course of performing his official duties or of murder committed while under a life sentence for murder. N. Y. Pen. Law § 125.30 (1967).

[8] New Hampshire and Washington provide for life imprisonment unless the jury recommends death. N. H. Rev. Stat. Ann. § 585:4 (1955); Wash. Rev. Code § 9.48.030 (1956). Maryland permits the trial court alone to decide the penalty in its discretion without

A fair cross-section of the community may produce a jury almost certain to impose the death penalty if guilt were found; or it may produce a jury almost certain not to impose it. The conscience of the community is subject to many variables, one of which is the attitude toward the death sentence. If a particular community were overwhelmingly opposed to capital punishment, it would not be able to exercise a discretion to impose or not impose the death sentence. A jury representing the conscience of that community would do one of several things depending on the type of state law governing it: it would avoid the death penalty by recommending mercy or it would avoid it by finding guilt of a lesser offense.

In such instance, why should not an accused have the benefit of that controlling principle of mercy in the community? Why should his fate be entrusted exclusively to a jury that was either enthusiastic about capital punishment or so undecided that it could exercise a discretion to impose it or not, depending on how it felt about the particular case?

I see no constitutional basis for excluding those who are so opposed to capital punishment that they would never inflict it on a defendant. Exclusion of them means the selection of jurors who are either protagonists of the death penalty or neutral concerning it. That results in a systematic exclusion of qualified groups, and the deprivation to the accused of a cross-section of the community for decision on both his guilt and his punishment.

The Court in *Logan* v. *United States*, 144 U. S. 263, 298, held that prospective jurors who had conscientious scruples concerning infliction of the death penalty were rightly challenged by the prosecution for cause, stating

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submitting the matter to the jury in cases of rape and aggravated kidnaping, Md. Ann. Code, Art. 27, §§ 461, 338 (1967).

that such jurors would be prevented "from standing indifferent between the government and the accused, and from trying the case according to the law and the evidence. . . ." That was a federal prosecution, the requirement being "an impartial jury" as provided in the Sixth Amendment, a requirement now applicable to the States by reason of the incorporation of the Jury Clause of the Sixth Amendment into the Due Process Clause of the Fourteenth. *Duncan* v. *Louisiana, ante,* p. 145.

But where a State leaves the fixing of the penalty to the jury, or provides for a lesser penalty on recommendation of mercy by the jury, or gives the jury power to find guilt in a lesser degree, the law leaves the jury great leeway. Those with scruples against capital punishment can try the case "according to the law and the evidence," because the law does not contain the inexorable command of "an eye for an eye." Rather "the law" leaves the degree of punishment to the jury. *Logan* v. *United States* in the setting of the present case [9] does not state what I believe is the proper rule. Whether in other circumstances it states a defensible rule is a question we need not reach. Where the jury has the discretion to impose the death penalty or not to impose it, the *Logan* rule is, in my opinion, an improper one. For it results in weeding out those members of the community most likely to recommend mercy and to leave in those most likely not to recommend mercy.[10]

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[9] The ruling on the "impartial jury" in *Logan* v. *United States,* seems erroneous on the facts and the applicable law of that case. The governing statute (a Texas statute), 144 U. S., at 264, n. 1, left to the jury "the degree of murder, as well as the punishment."

[10] "[T]he gulf between the community and the death-qualified jury grows as the populace becomes the more infected with modern notions of criminality and the purpose of punishment. Accordingly, the community support for the death verdict becomes progressively narrower, with all that this connotes for the administration of justice.

Challenges for cause and peremptory challenges do not conflict with the constitutional right of the accused to trial by an "impartial jury." No one is guaranteed a partial jury. Such challenges generally are highly individualized not resulting in depriving the trial of an entire class or of various shades of community opinion or of the "subtle interplay of influence" of one juror on another. *Ballard* v. *United States*, 329 U. S. 187, 193. In the present case, however, where the jury is given discretion in fixing punishment,[11] the wholesale exclusion of a class that makes up a substantial portion of the population [12] produces an unrepresentative jury.[13]

Moreover, as the willingness to impose the death penalty—that is, *to be sworn as a juror in a capital case*—wanes in a particular community, the prejudicial effect of the death-qualified jury upon the issue of guilt or innocence waxes; to man the capital jury, the resort must increasingly be to the extremists of the community—those least in touch with modern ideas of criminal motivation, with the constant refinement of the finest part of our cultural heritage, the dedication to human charity and understanding. The due-process implications of this flux seem obvious. Yesterday's practice becomes less and less relevant to today's problem."

Oberer, Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt?, 39 Tex. L. Rev. 545, 556–557 (1961).

[11] In the words of the Illinois Supreme Court, the death penalty is "an optional form of punishment which [the jury is] free to select or reject as it [sees] fit." *People* v. *Bernette*, 30 Ill. 2d 359, 370, 197 N. E. 2d 436, 443 (1964). See also *People* v. *Dukes*, 12 Ill. 2d 334, 146 N. E. 2d 14 (1957); *People* v. *Weisberg*, 396 Ill. 412, 71 N. E. 2d 671 (1947); *People* v. *Martellaro*, 281 Ill. 300, 117 N. E. 1052 (1917).

[12] As the Court points out, a substantial number of the veniremen (47 out of 95), who we may assume represented a fair cross-section of the community, were excluded because of their opposition to the death penalty.

[13] In *Rudolph* v. *Alabama*, 375 U. S. 889, I joined the opinion of Mr. Justice Goldberg, dissenting from the Court's denial of certiorari,

Although the Court reverses as to penalty, it declines to reverse the verdict of guilt rendered by the same jury. It does so on the ground that petitioner has not demonstrated on this record that the jury which convicted him was "less than neutral with respect to *guilt*," *ante*, at 520, n. 18, because of the exclusion of all those opposed in some degree to capital punishment. The Court fails to find on this record "an unrepresentative jury on the issue of guilt." *Ante*, at 518. But we do not require a showing of specific prejudice when a defendant has been deprived of his right to a jury representing a cross-section of the community. See *Ballard* v. *United States*, 329 U. S. 187, 195; *Ware* v. *United States*, 123 U. S. App. D. C. 34, 356 F. 2d 787 (1965). We can as easily assume that the absence of those opposed to capital punishment would rob the jury of certain peculiar qualities of human nature as would the exclusion of women from juries. *Ballard* v. *United States*, 329 U. S., at 193–194. I would not require a specific showing of a likelihood of prejudice, for I feel that we must proceed on the assumption that in many, if not most, cases of class exclusion on the basis of beliefs or attitudes some prejudice does result and many times will not be subject to precise measurement. Indeed, that prejudice "is so subtle, so intangible, that it escapes the ordinary methods of proof." *Fay* v. *New*

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who expressed the view that this Court should consider the question whether the Eighth Amendment prohibits "the imposition of the death penalty on a convicted rapist who has neither taken nor endangered human life." *Ibid.* In contrast, the instant case concerns a convicted murderer who has been sentenced to death for his crime. The requirement imposed by the Sixth and the Fourteenth Amendments that a jury be representative of a cross-section of the community is, of course, separate and distinct from the question whether the death penalty offends the Eighth Amendment.

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York, 332 U. S., at 300 (dissenting opinion). In my view, that is the essence of the requirement that a jury be drawn from a cross-section of the community.

MR. JUSTICE BLACK, with whom MR. JUSTICE HARLAN and MR. JUSTICE WHITE join, dissenting.

The Court closes its reversal of this murder case with the following graphic paragraph:

> "Whatever else might be said of capital punishment, it is at least clear that its imposition by a hanging jury cannot be squared with the Constitution. The State of Illinois has stacked the deck against the petitioner. To execute this death sentence would deprive him of his life without due process of law."

I think this charge against the Illinois courts is completely without support in the record. The opinion affirming this conviction for a unanimous Illinois Supreme Court was written by Justice Walter Schaefer, a judge nationally recognized as a protector of the constitutional rights of defendants charged with crime. It seems particularly unfortunate to me that this Court feels called upon to charge that Justice Schaefer and his associates would let a man go to his death after the trial court had contrived a "hanging jury" and, in this Court's language, "stacked the deck" to bring about the death sentence for petitioner. With all due deference it seems to me that one might much more appropriately charge that this Court has today written the law in such a way that the States are being forced to try their murder cases with biased juries. If this Court is to hold capital punishment unconstitutional, I think it should do so forthrightly, not by making it impossible for States to get juries that will enforce the death penalty.

Now to the case.

On April 29, 1959, *more than nine years ago,* petitioner shot and killed a policeman in order to escape arrest. Petitioner had been struggling on the street with a woman whom he had met in a tavern when a police patrol car assigned to the vicinity stopped at a nearby traffic light. The woman was able to free herself from petitioner's grasp and rushed to the patrol car where she told the two policemen in it that petitioner was carrying a gun. Petitioner overheard this conversation and fled to a nearby parking lot and hid in one of the many parked trailers and tractors. It was while one of the policemen was searching this trailer that petitioner shot him. There is no doubt that petitioner killed the policeman since the dying officer himself identified petitioner at the hospital, and petitioner later lectured the police on using such young and inexperienced officers. And as I read the majority's opinion, even those who agreed to it are unwilling to cast any doubt on petitioner's conviction. See n. 21, majority opinion.

At his trial for murder petitioner was represented by three appointed counsel, the chief of whom was the then Chairman of the Chicago Bar Association Committee for the Defense of the Indigent. It is important to note that when those persons who acknowledged having "conscientious or religious scruples against the infliction of the death penalty" were excluded from the jury, defense counsel made no attempt to show that they were nonetheless competent jurors. In fact, when the jurors finally were accepted by defense counsel, the defense still had three peremptory challenges left to exercise. In the past this has frequently been taken as an indication that the jurors who were impaneled were impartial. See cases collected in *United States* v. *Puff,* 211 F. 2d 171, 185 (C. A. 2d Cir. 1954). And it certainly amounts to a clear showing that in this case petitioner's able and dis-

tinguished counsel did not believe petitioner was being tried by a biased, much less a "hanging," jury.

After petitioner's conviction, another very distinguished attorney was appointed to prosecute his appeal, and an extensive brief alleging some 15 separate trial errors was filed in the Supreme Court of Illinois. Again, however, there was no indication that anyone thought petitioner had been convicted by a biased jury. On March 25, 1963, the Supreme Court of Illinois affirmed petitioner's conviction in a lengthy opinion. *People* v. *Witherspoon*, 27 Ill. 2d 483, 190 N. E. 2d 281. Petitioner attacked his conviction by pursuing both habeas corpus relief and the statutory post-conviction remedy. Again no mention was made of any alleged bias in the jury. When the Supreme Court of Illinois on January 17, 1964, refused the requested relief, petitioner sought federal habeas corpus, and was assisted by a third court-appointed attorney. As in his previous attacks no claim was made that petitioner was denied an impartial jury. Petitioner was unsuccessful in this federal habeas corpus bid, *Witherspoon* v. *Ogilvie*, 337 F. 2d 427 (C. A. 7th Cir. 1964), and we denied certiorari. *Witherspoon* v. *Ogilvie*, 379 U. S. 950. Then in February 1965, petitioner filed a petition in the state courts requesting whatever form of remedy is "provided for by Illinois law." Among other claims, now appeared the contention that petitioner's constitutional rights were violated when the trial court excused for cause prospective jurors having scruples against capital punishment. The state trial judge dismissed the petition on the ground that it failed to set forth facts sufficient to entitle the petitioner to relief. Petitioner then appealed to the Illinois Supreme Court where he was appearing for the third time in this case and where, more than six years after his trial, he argued that the disqualification for cause of jurors having

conscientious or religious scruples against capital punishment was unconstitutional.[1] That court disallowed petitioner's claim concluding that "we adhere to the system in which each side is allowed to examine jurors and eliminate those who can not be impartial." 36 Ill. 2d, at 476, 224 N. E. 2d, at 262. This Court subsequently granted certiorari to review the decision of the Illinois Supreme Court.

At the time of petitioner's trial, § 743 of Ill. Rev. Stat., c. 38, provided:

> "In trials for murder it shall be a cause for challenge of any juror who shall, on being examined, state that he has conscientious scruples against capital punishment, or that he is opposed to the same."

The obvious purpose of this section is to insure, as well as laws can insure such a thing, that there be an impartial jury in cases in Illinois where the death sentence may be imposed. And this statute recognizes that the people as a whole, or as they are usually called, "society" or "the state," have as much right to an impartial jury as do criminal defendants. This Court itself has made that quite clear:

> "It is to be remembered that such impartiality requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held." *Hayes* v. *Missouri*, 120 U. S. 68, 70.

See also *Swain* v. *Alabama*, 380 U. S. 202, 219–220.

As I see the issue in this case, it is a question of plain bias. A person who has conscientious or religious scru-

[1] Certainly long delays in raising objections to trial proceedings should not be condoned except to prevent intolerable miscarriages of justice. Cf. *Fay* v. *Noia*, 372 U. S. 391.

ples against capital punishment will seldom if ever vote to impose the death penalty. This is just human nature, and no amount of semantic camouflage can cover it up. In the same manner, I would not dream of foisting on a criminal defendant a juror who admitted that he had conscientious or religious scruples against not inflicting the death sentence on any person convicted of murder (a juror who claims, for example, that he adheres literally to the Biblical admonition of "an eye for an eye"). Yet the logical result of the majority's holding is that such persons must be allowed so that the "conscience of the community" will be fully represented when it decides "the ultimate question of life or death." While I have always advocated that the jury be as fully representative of the community as possible, I would never carry this so far as to require that those biased against one of the critical issues in a trial should be represented on a jury. I still subscribe to the words of this Court written over 75 years ago in *Logan* v. *United States*, 144 U. S. 263, 298:

> "As the defendants were indicted and to be tried for a crime punishable with death, those jurors who stated on *voir dire* that they had 'conscientious scruples in regard to the infliction of the death penalty for crime' were rightly permitted to be challenged by the government for cause. A juror who has conscientious scruples on any subject, which prevent him from standing indifferent between the government and the accused, and from trying the case according to the law and the evidence, is not an impartial juror. This court has accordingly held that a person who has a conscientious belief that polygamy is rightful may be challenged for cause on a trial for polygamy. *Reynolds* v. *United States*, 98 U. S. 145, 147, 157; *Miles* v. *United States*, 103 U. S. 304, 310. And the principle has been applied to

> the very question now before us by Mr. Justice Story in *United States* v. *Cornell,* 2 Mason, 91, 105, and by Mr. Justice Baldwin in *United States* v. *Wilson,* Baldwin, 78, 83, as well as by the courts of every State in which the question has arisen, and by express statute in many States. Whart. Crim. Pl. (9th ed.) § 664."

The majority opinion attempts to equate those who have conscientious or religious scruples against the death penalty with those who do not in such a way as to balance the allegedly conflicting viewpoints in order that a truly representative jury can be established to exercise the community's discretion in deciding on punishment. But for this purpose I do not believe that those who have conscientious or religious scruples against the death penalty and those who have no feelings either way are in any sense comparable. Scruples against the death penalty are commonly the result of a deep religious conviction or a profound philosophical commitment developed after much soul-searching. The holders of such scruples must necessarily recoil from the prospect of making possible what they regard as immoral. On the other hand, I cannot accept the proposition that persons who do not have conscientious scruples against the death penalty are "prosecution prone." [2] With regard to this group, I would agree with the following statement of the Court of Appeals for the District of Columbia Circuit:

> "No proof is available, so far as we know, and we can imagine none, to indicate that, generally speaking, persons not opposed to capital punishment are so bent in their hostility to criminals as to be incapable of rendering impartial verdicts on the law and the evidence in a capital case. Being not op-

[2] See *Bumper* v. *North Carolina, post,* p. 554 (dissenting opinion).

posed to capital punishment is not synonymous with favoring it. Individuals may indeed be so prejudiced in respect to serious crimes that they cannot be impartial arbiters, but that extreme is not indicated by mere lack of opposition to capital punishment. The two antipathies can readily coexist; contrariwise either can exist without the other; and, indeed, neither may exist in a person. It seems clear enough to us that a person or a group of persons may not be opposed to capital punishment and at the same time may have no particular bias against any one criminal or, indeed, against criminals as a class; people, it seems to us, may be completely without a controlling conviction one way or the other on either subject. . . ." *Turberville* v. *United States,* 112 U. S. App. D. C. 400, 409–410, 303 F. 2d 411, 420–421 (1962), cert. denied, 370 U. S. 946.

It seems to me that the Court's opinion today must be read as holding just the opposite from what has been stated above. For no matter how the Court might try to hide it, the implication is inevitably in its opinion that people who do not have conscientious scruples against the death penalty are somehow callous to suffering and are, as some of the commentators cited by the Court called them, "prosecution prone." This conclusion represents a psychological foray into the human mind that I have considerable doubt about my ability to make, and I must confess that the two or three so-called "studies" cited by the Court on this subject are not persuasive to me.

Finally, I want to point out that the *real* holding in this case is, at least to me, very ambiguous. If we are to take the opinion literally, then I submit the Court today has decided nothing of substance, but has merely indulged itself in a semantic exercise. For as I read the

opinion, the new requirement placed upon the States is that they cease asking prospective jurors whether they have "conscientious or religious scruples against the infliction of the death penalty," but instead ask whether "they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them." (See majority opinion, n. 21.) I believe that this fine line the Court attempts to draw is based on a semantic illusion and that the practical effect of the Court's new formulation of the question to be asked state juries will not produce a significantly different kind of jury from the one chosen in this case. And I might add that the States will have been put to a great deal of trouble for nothing. Yet, as I stated above, it is not clear that this is all the Court is holding. For the majority opinion goes out of its way to state that in some future case a defendant might well establish that a jury selected in the way the Illinois statute here provides is "less than neutral with respect to *guilt*." (Majority opinion, n. 18.) This seems to me to be but a thinly veiled warning to the States that they had better change their jury selection procedures or face a decision by this Court that their murder convictions have been obtained unconstitutionally.

I believe that the Court's decision today goes a long way to destroying the concept of an impartial jury as we have known it. This concept has been described most eloquently by Justice Story:

> "To insist on a juror's sitting in a cause when he acknowledges himself to be under influences, no matter whether they arise from interest, from prejudices, or from religious opinions, which will prevent him from giving a true verdict according to law and evidence, would be to subvert the objects of a trial by jury, and to bring into disgrace and contempt,

> the proceedings of courts of justice. We do not sit here to produce the verdicts of partial and prejudiced men; but of men, honest and indifferent in causes. This is the administration of justice [which is required]." *United States* v. *Cornell*, 25 Fed. Cas. 650, 655–656 (No. 14,868) (1820).

It is just as necessary today that juries be impartial as it was in 1820 when Justice Story made this statement. I shall not contribute in any way to the destruction of our ancient judicial and constitutional concept of trial by an impartial jury by forcing the States through "constitutional doctrine" laid down by this Court to accept jurors who are bound to be biased. For this reason I dissent.

MR. JUSTICE WHITE, dissenting.

The Court does not hold that imposition of the death penalty offends the Eighth Amendment. Nor does it hold that a State Legislature may not specify only death as the punishment for certain crimes, so that the penalty is imposed automatically upon a finding of guilt, with no discretion in judge or jury. Either of these holdings might furnish a satisfactory predicate for reversing this judgment. Without them, the analytic basis of the result reached by the Court is infirm; the conclusion is reached because the Court says so, not because of reasons set forth in the opinion.

The Court merely asserts that this legislative attempt to impose the death penalty on some persons convicted of murder, but not on everyone so convicted, is constitutionally unsatisfactory:

> "It is, of course, settled that a State may not entrust the determination of whether a man is innocent or guilty to a tribunal 'organized to convict.' It requires but a short step from that principle to hold, as we do today, that a State may not entrust

> the determination of whether a man should live or die to a tribunal organized to return a verdict of death." *Ante,* at 521. (Citations and footnote omitted.)

The sole reason connecting the two sentences is the raw assertion that the situations are closely related. Yet the Constitution, which bars a legislative determination that everyone indicted should be convicted, and so requires the judgment of a guilt-determining body unprejudiced as to the result,[1] speaks in entirely different terms to the determination of sentence, even when that sentence is death. The Court does not deny that the legislature can impose a particular penalty, including death, on all persons convicted of certain crimes. Why, then, should it be disabled from delegating the penalty decision to a group who will impose the death penalty more often than would a group differently chosen?

All Illinois citizens, including those who oppose the death penalty, are assured by the Constitution a fair opportunity to influence the legislature's determinations about criminal sentences. *Reynolds* v. *Sims,* 377 U. S. 533 (1964), and succeeding cases. Those opposing the death penalty have not prevailed in that forum, however. The representatives of the people of Illinois have determined that the death penalty decision should be made in individual cases by a group of those citizens without conscientious scruples about one of the sentencing alternatives provided by the legislature. This method of implementing the majority's will was presumably related to a desire to preserve the traditional policy of requiring

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[1] While I agree generally with the opinion of MR. JUSTICE BLACK, and so have joined it, I would not wholly foreclose the possibility of a showing that certain restrictions on jury membership imposed because of jury participation in penalty determination produce a jury which is not constitutionally constituted for the purpose of determining guilt.

that jury verdicts be unanimous. The legislature undoubtedly felt that if all citizens could serve on the jury, and if one citizen with especially pronounced "scruples" could prevent a decision to impose death, the penalty would almost never be imposed.[2] We need not decide today whether any possible delegation of the sentencing decision, for example a delegation to the surviving relatives of the victim, would be constitutionally impermissible because it would offend the conscience of civilized men, *Rochin* v. *California*, 342 U. S. 165, 172 (1952). The delegation by Illinois, which merely excludes those with doubts in policy about one of the punishments among which the legislature sought to have them choose, seems an entirely reasonable and sensible legislative act.

The Court may have a strong dislike for this particular sentence, and it may desire to meet Mr. Koestler's standards of charity. Those are laudable motives, but hardly a substitute for the usual processes of reasoned analysis. If the Court can offer no better constitutional grounds for today's decision than those provided in the opinion, it should restrain its dislike for the death penalty and leave the decision about appropriate penalties to branches of government whose members, selected by popular vote, have an authority not extended to this Court.

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[2] The States should be aware of the ease with which they can adjust to today's decision. They continue to be permitted to impose the penalty of death on all who commit a particular crime. And replacing the requirement of unanimous jury verdicts with majority decisions about sentence should achieve roughly the same result reached by the Illinois Legislature through the procedure struck down today.

BUMPER *v.* NORTH CAROLINA.

CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA.

No. 1016. Argued April 24–25, 1968.—Decided June 3, 1968.

Petitioner was tried for rape in North Carolina, an offense punishable by death unless the jury recommends life imprisonment. The prosecution was permitted to challenge for cause all prospective jurors who stated that they were opposed to capital punishment or had conscientious scruples against imposing the death penalty. A rifle which was introduced at the trial was obtained by a search of petitioner's grandmother's house, where he resided. Four officers appeared at the home, announced that they had a warrant to search it, and were told by the owner to "[g]o ahead." At the hearing on a motion to suppress, which was denied, the prosecutor stated that he did not rely on a warrant to justify the search, but on consent. The jury found petitioner guilty, but recommended life imprisonment, and the State Supreme Court affirmed. *Held:*

1. Petitioner has adduced no evidence to support his claim that a jury from which those who are opposed to capital punishment or have conscientious scruples against imposing the death penalty are excluded for cause is necessarily "prosecution prone," warranting reversal of his conviction for denial of his Sixth and Fourteenth Amendment rights to an impartial jury. *Witherspoon* v. *Illinois*, *ante*, p. 510. P. 545.

2. A search cannot be justified as lawful on the basis of consent when that "consent" has been given only after the official conducting the search has asserted that he possesses a warrant; there is no consent under such circumstances. Pp. 546–550.

3. Because the rifle, which was erroneously admitted into evidence, was plainly damaging against petitioner, its admission was not harmless error. *Chapman* v. *California*, 386 U. S. 18. P. 550.

270 N. C. 521, 155 S. E. 2d 173, reversed and remanded.

Norman B. Smith argued the cause and filed briefs for petitioner, *pro hac vice*.

Harry W. McGalliard, Deputy Attorney General of North Carolina, argued the cause for respondent. With him on the brief was *T. W. Bruton*, Attorney General.

Briefs of *amici curiae* were filed by *Jack Greenberg, James M. Nabrit III, Michael Meltsner, Leroy D. Clark, Norman C. Amaker,* and *Charles S. Ralston* for the NAACP Legal Defense and Educational Fund, Inc., et al., and by *F. Lee Bailey, pro se.*

MR. JUSTICE STEWART delivered the opinion of the Court.

The petitioner was brought to trial in a North Carolina court upon a charge of rape, an offense punishable in that State by death unless the jury recommends life imprisonment.[1] Among the items of evidence introduced by the prosecution at the trial was a .22-caliber rifle allegedly used in the commission of the crime. The jury found the petitioner guilty, but recommended a sentence of life imprisonment.[2] The trial court imposed that sentence, and the Supreme Court of North Carolina affirmed the judgment.[3] We granted certiorari [4] to consider two separate constitutional claims pressed unsuccessfully by the petitioner throughout the litigation in the North Carolina courts. First, the petitioner argues that his constitutional right to an impartial jury was violated in this capital case when the prosecution was permitted to challenge for cause all prospective jurors who stated that they were opposed to capital punishment or had con-

[1] "Every person who is convicted of ravishing and carnally knowing any female of the age of twelve years or more by force and against her will, or who is convicted of unlawfully and carnally knowing and abusing any female child under the age of twelve years, shall suffer death: Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury." N. C. Gen. Stat. § 14–21 (1953).

[2] The petitioner was also convicted upon two charges of felonious assault and sentenced to consecutive 10-year prison terms.

[3] 270 N. C. 521, 155 S. E. 2d 173.

[4] 389 U. S. 1034.

scientious scruples against imposing the death penalty. Secondly, the petitioner contends that the .22-caliber rifle introduced in evidence against him was obtained by the State in a search and seizure violative of the Fourth and Fourteenth Amendments.

I.

In *Witherspoon* v. *Illinois, ante,* p. 510, we have held that a death sentence cannot constitutionally be executed if imposed by a jury from which have been excluded for cause those who, without more, are opposed to capital punishment or have conscientious scruples against imposing the death penalty. Our decision in *Witherspoon* does not govern the present case, because here the jury recommended a sentence of life imprisonment. The petitioner argues, however, that a jury qualified under such standards must necessarily be biased as well with respect to a defendant's guilt, and that his conviction must accordingly be reversed because of the denial of his right under the Sixth and Fourteenth Amendments to trial by an impartial jury. *Duncan* v. *Louisiana, ante,* p. 145; *Turner* v. *Louisiana,* 379 U. S. 466, 471–473; *Irvin* v. *Dowd,* 366 U. S. 717, 722–723. We cannot accept that contention in the present case. The petitioner adduced no evidence to support the claim that a jury selected as this one was is necessarily "prosecution prone," [5] and the materials referred to in his brief are no more substantial than those brought to our attention in *Witherspoon.*[6] Accordingly, we decline to reverse the judgment of conviction upon this basis.

[5] He did submit affidavits to the North Carolina Supreme Court referring to studies by W. C. Wilson and F. J. Goldberg, see *Witherspoon* v. *Illinois, ante,* at 517, n. 10. The court made no findings with respect to those studies and did not mention them in its opinion.

[6] In addition to the materials mentioned in *Witherspoon, ante,* at 517, n. 10, the petitioner's brief in this Court cites an unpublished

II.

The petitioner lived with his grandmother, Mrs. Hattie Leath, a 66-year-old Negro widow, in a house located in a rural area at the end of an isolated mile-long dirt road. Two days after the alleged offense but prior to the petitioner's arrest, four white law enforcement officers—the county sheriff, two of his deputies, and a state investigator—went to this house and found Mrs. Leath there with some young children. She met the officers at the front door. One of them announced, "I have a search warrant to search your house." Mrs. Leath responded, "Go ahead," and opened the door. In the kitchen the officers found the rifle that was later introduced in evidence at the petitioner's trial after a motion to suppress had been denied.

At the hearing on this motion, the prosecutor informed the court that he did not rely upon a warrant to justify the search, but upon the consent of Mrs. Leath.[7] She testified at the hearing, stating, among other things:

> "Four of them came. I was busy about my work, and they walked into the house and one of them walked up and said, 'I have a search warrant to search your house,' and I walked out and told them to come on in. . . . He just come on in and said he had a warrant to search the house, and he didn't

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dissertation by R. Crosson, An Investigation Into Certain Personality Variables Among Capital Trial Jurors (Western Reserve University, January 1966), involving a sample of 72 jurors in Ohio.

[7] "THE COURT: There is a motion here that says the property [was] seized against the will of Mrs. Hattie Leath and without a search warrant. Now, the question is, are we going into the search warrant?

"MR. COOPER: The State is not relying on the search warrant.

"THE COURT: Are you stating so for the record?

"MR. COOPER: Yes, sir."

read it to me or nothing. So, I just told him to come on in and go ahead and search, and I went on about my work. I wasn't concerned what he was about. I was just satisfied. He just told me he had a search warrant, but he didn't read it to me. He did tell me he had a search warrant.

. . . . .

". . . He said he was the law and had a search warrant to search the house, why I thought he could go ahead. I believed he had a search warrant. I took him at his word. . . . I just seen them out there in the yard. They got through the door when I opened it. At that time, I did not know my grandson had been charged with crime. Nobody told me anything. They didn't tell me anything, just picked it up like that. They didn't tell me nothing about my grandson." [8]

Upon the basis of Mrs. Leath's testimony, the trial court found that she had given her consent to the search, and

[8] She also testified, at another point:

"I had no objection to them making a search of my house. I was willing to let them look in any room or drawer in my house they wanted to. Nobody threatened me with anything. Nobody told me they were going to hurt me if I didn't let them search my house. Nobody told me they would give me any money if I would let them search. I let them search, and it was all my own free will. Nobody forced me at all.

. . . . .

"I just give them a free will to look because I felt like the boy wasn't guilty."

The transcript of the suppression hearing comes to us from North Carolina in the form of a narrative; *i. e.*, the actual questions and answers have been rewritten in the form of continuous first person testimony. The effect is to put into the mouth of the witness some of the words of the attorneys. In the case of an obviously compliant witness like Mrs. Leath, the result is a narrative that has the tone of decisiveness but is shot through with contradictions.

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denied the motion to suppress.[9] The Supreme Court of North Carolina approved the admission of the evidence on the same basis.[10]

The issue thus presented is whether a search can be justified as lawful on the basis of consent when that "consent" has been given only after the official conducting the search has asserted that he possesses a warrant.[11] We hold that there can be no consent under such circumstances.

When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given.[12] This burden cannot be discharged by

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[9] "The Court finds that from the evidence of Mrs. Hattie Leath that it is of a clear and convincing nature that she, the said Mrs. Hattie Leath, voluntarily consented to the search of her premises, as is more particularly set forth in her evidence, and that that consent was specifically given and is not the result of coercion from the officers."

[10] That court also stated: "The fact that [the search] did reveal the presence of the guilty weapon . . . justifies the search. . . . [The petitioner's] rights have not been violated. Rather, his wrongs have been detected." 270 N. C., at 530–531, 155 S. E. 2d, at 180.

Any idea that a search can be justified by what it turns up was long ago rejected in our constitutional jurisprudence. "A search prosecuted in violation of the Constitution is not made lawful by what it brings to light . . . ." *Byars* v. *United States*, 273 U. S. 28, 29. See also *United States* v. *Di Re*, 332 U. S. 581, 595; *Henry* v. *United States*, 361 U. S. 98, 103.

[11] Mrs. Leath owned both the house and the rifle. The petitioner concedes that her voluntary consent to the search would have been binding upon him. Conversely, there can be no question of the petitioner's standing to challenge the lawfulness of the search. He was the "one against whom the search was directed," *Jones* v. *United States*, 362 U. S. 257, 261, and the house searched was his home. The rifle was used by all members of the household and was found in the common part of the house.

[12] *Wren* v. *United States*, 352 F. 2d 617; *Simmons* v. *Bomar*, 349 F. 2d 365; *Judd* v. *United States*, 89 U. S. App. D. C. 64, 190 F. 2d 649; *Kovach* v. *United States*, 53 F. 2d 639.

showing no more than acquiescence to a claim of lawful authority.[13] A search conducted in reliance upon a warrant cannot later be justified on the basis of consent if it turns out that the warrant was invalid.[14] The result can be no different when it turns out that the State does not even attempt to rely upon the validity of the warrant,

[13] See, *e. g.*, *Amos* v. *United States*, 255 U. S. 313, 317; *Johnson* v. *United States*, 333 U. S. 10, 13; *Higgins* v. *United States*, 93 U. S. App. D. C. 340, 209 F. 2d 819; *United States* v. *Marra*, 40 F. 2d 271; *MacKenzie* v. *Robbins*, 248 F. Supp. 496.

[14] "Orderly submission to law-enforcement officers who, in effect, represented to the defendant that they had the authority to enter and search the house, against his will if necessary, was not such consent as constituted an understanding, intentional and voluntary waiver by the defendant of his fundamental rights under the Fourth Amendment to the Constitution." *United States* v. *Elliott*, 210 F. Supp. 357, 360.

"One is not held to have consented to the search of his premises where it is accomplished pursuant to an apparently valid search warrant. On the contrary, the legal effect is that consent is on the basis of such a warrant and his permission is construed as an intention to abide by the law and not resist the search under the warrant, rather than an invitation to search." *Bull* v. *Armstrong*, 254 Ala. 390, 394, 48 So. 2d 467, 470.

"One who, upon the command of an officer authorized to enter and search and seize by search warrant, opens the door to the officer and acquiesces in obedience to such a request, no matter by what language used in such acquiescence, is but showing a regard for the supremacy of the law. . . . The presentation of a search warrant to those in charge at the place to be searched, by one authorized to serve it, is tinged with coercion, and submission thereto cannot be considered an invitation that would waive the constitutional right against unreasonable searches and seizures, but rather is to be considered a submission to the law." *Meno* v. *State*, 197 Ind. 16, 24, 164 N. E. 93, 96.

See also *Salata* v. *United States*, 286 F. 125; *Brown* v. *State*, 42 Ala. App. 429, 167 So. 2d 281; *Mattingly* v. *Commonwealth*, 199 Ky. 30, 250 S. W. 105. Cf. *Gibson* v. *United States*, 80 U. S. App. D. C. 81, 149 F. 2d 381; *Naples* v. *Maxwell*, 271 F. Supp. 850; *Atwood* v. *State*, 44 Okla. Cr. 206, 280 P. 319; *State* v. *Watson*, 133 Miss. 796, 98 So. 241.

or fails to show that there was, in fact, any warrant at all.[15]

When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion—albeit colorably lawful coercion. Where there is coercion there cannot be consent.

We hold that Mrs. Leath did not consent to the search, and that it was constitutional error to admit the rifle in evidence against the petitioner. *Mapp* v. *Ohio*, 367 U. S. 643. Because the rifle was plainly damaging evidence against the petitioner with respect to all three of the charges against him, its admission at the trial was not harmless error. *Chapman* v. *California*, 386 U. S. 18.[16]

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[15] During the course of the argument in this case we were advised that the searching officers did, in fact, have a warrant. But no warrant was ever returned, and there is no way of knowing the conditions under which it was issued, or determining whether it was based upon probable cause.

[16] It is suggested in dissent that "[e]ven assuming . . . that there was no consent to search and that the rifle . . . should not have been admitted into evidence, . . . the conviction should stand." This suggestion seems to rest on the "horrible" facts of the case, and the assumption that the petitioner was guilty. But it is not the function of this Court to determine innocence or guilt, much less to apply our own subjective notions of justice. Our duty is to uphold the Constitution of the United States.

In view of the discursive factual recital contained in the dissenting opinion, however, an additional word may be in order. There can be no doubt that the crimes were grave and shocking. There *can* be doubt that the petitioner was their perpetrator. The crimes were committed at night. When, at first, the victims separately viewed a lineup that included the petitioner, each of the victims identified the same man as their assailant. That man was *not* the petitioner. Later, the victims together viewed another lineup, and every man in the lineup was made to speak *his name* for "voice identification." This time the victims identified the petitioner as their assailant. At

The judgment of the Supreme Court of North Carolina is, accordingly, reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE DOUGLAS joins Part II of the opinion of the Court. Since, however, the record shows that 16 of 53 prospective jurors were excused for cause because of their opposition to capital punishment, he would also reverse on the ground that petitioner was denied the right to trial on the issue of guilt by a jury representing a fair cross-section of the community. *Witherspoon* v. *Illinois, ante,* at 523 (separate opinion). Under North Carolina law, rape is punishable by death unless the jury recommends life imprisonment. N. C. Gen. Stat. § 14–21 (1953). But an indictment for rape includes the lesser offense of an assault with intent to commit rape, and the court has the duty to submit to the jury the lesser degrees of the offense of rape which are supported by the evidence. *State* v. *Green,* 246 N. C. 717, 100 S. E. 2d 52 (1957). See N. C. Gen. Stat. §§ 15–169, 15–170 (1953). These include assault with intent to commit rape, for which the range of punishment is one to 15 years' imprisonment (N. C. Gen. Stat. § 14–22), and assault (N. C. Gen. Stat. § 14–33). In the instant case, the trial judge did in fact charge the jury with respect to these lesser offenses.

MR. JUSTICE HARLAN, concurring.

While I join in the judgment of the Court and in Part II of its opinion, I am prompted to add a brief note.

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the time of the lineups a local newspaper had reported that a man named Wayne Bumper was being held by the sheriff as the "prime suspect" in the case, and at least one of the victims knew of that fact. Earlier both victims had been shown a collection of photographs. One victim identified a picture of the petitioner; the petitioner's name was written on the back of the photograph.

I share, as I am sure every member of the majority does, MR. JUSTICE BLACK's abhorrence of the brutal crime of which petitioner stands convicted. To avoid any misapprehension, I wish to make it perfectly clear that reversal of this conviction is not a "penalty" imposed on the State for infringement of federal constitutional rights. Reversal by this Court results, as always, only from a decision that petitioner was not constitutionally proved guilty and hence there is no legally valid basis for imposition of a penalty upon him.

In determining whether a criminal defendant was convicted "according to law," the test is not and cannot be simply whether this Court finds credible the evidence against him. Crediting or discrediting evidence is the function of the trier of fact, in this case a jury. The jury's verdict is a lawful verdict, however, only if it is based upon evidence constitutionally admissible. When it is not, as it is not here, reversal rests on the oldest and most fundamental principle of our criminal jurisprudence—that a defendant is entitled to put the prosecution to its lawful proof.

The evidence against petitioner consisted in part of a gun that he alleged was unlawfully taken from the home of Mrs. Leath, where petitioner was living. The State contended that Mrs. Leath had consented to the search of her home. However, this "consent" was obtained immediately after a sheriff told Mrs. Leath that he had a search warrant, that is, that he had a lawful right to enter her home with or without consent. Nothing Mrs. Leath said in response to that announcement can be taken to mean that she considered the officers welcome in her home with or without a warrant. What she would have done if the sheriff had not said he had a warrant is, on this record, a hypothetical question about an imaginary situation that Mrs. Leath never faced.

Of course, if the officers had a valid search warrant, no consent was required to make the search lawful. There was a search warrant in this case, and it remains possible that this warrant was issued under circumstances meeting all the requirements of the Federal Constitution. Consequently, if this were a situation where a state court had simply chosen the wrong line of constitutional analysis of this search, I would vote to remand the case to give the prosecution an opportunity to justify the search on proper grounds. However, as noted by the Court, the prosecution here explicitly and repeatedly renounced any reliance on the warrant. Like all other parties to lawsuits, a prosecutor has an obligation to the courts (including this Court) and to other parties to present its claims at the earliest appropriate time, and to create an adequate record. Cf. *Ciucci* v. *Illinois*, 356 U. S. 571, 573 (separate note of Mr. Justice Frankfurter and MR. JUSTICE HARLAN).

Finally, if I were persuaded that the admission of the gun was "harmless error," I would vote to affirm, and if I were persuaded that it was arguably harmless error, I would vote to remand the case for state consideration of the point. But the question cannot be whether, in the view of this Court, the defendant actually committed the crimes charged, so that the error was "harmless" in the sense that petitioner got what he deserved. The question is whether the error was such that it cannot be said that petitioner's guilt was adjudicated on the basis of constitutionally admissible evidence, which means, in this case, whether the properly admissible evidence was such that the improper admission of the gun could not have affected the result.

I do not think this can be said here. The critical question was the identity of the perpetrator of these crimes. The State introduced eyewitness identification of petitioner by his two victims, and a gun with which there

was evidence these victims were shot, together with testimony that it had been found in petitioner's place of abode. The jury could, of course, have found the testimony of the victims credible beyond a reasonable doubt, and convicted petitioner on this basis alone. But it might well not have. The addition of a tangible cross-check linking petitioner with the crime can hardly be said, from the judicial vantage point, to have been harmless surplusage.

MR. JUSTICE BLACK, dissenting.

I.

This case, like *Witherspoon* v. *Illinois, ante,* p. 510, decided today, was brought to this Court primarily to decide the question whether the constitutional rights of a criminal defendant are violated when prospective jurors who state they are opposed to capital punishment or who have conscientious scruples against imposing the death penalty are excluded for cause. As the Court in *Witherspoon* limited its holding to the question of punishment and not of guilt,[1] the jury issue became moot in this case since petitioner had been sentenced to life imprisonment. Ironically, however, this case now becomes about as good an example as can be found of the fallacious assumption of the holding in *Witherspoon.* For the *Witherspoon* decision rests on the premise that a jury "[c]ulled of all who harbor doubts about the wisdom of capital punishment" is somehow prosecution-prone, callous or even lacking in "charity."[2] Yet the jury in this case, from which had been excluded all persons who stated they were opposed to the death penalty, unanimously recommended life imprisonment in a case where, but for their recommendation, the death sentence would

[1] See *ante,* at 522, n. 21.

[2] See *ante,* at 520, n. 17.

have been automatic.[3] And this is a case where the evidence conclusively showed that the accused twice raped a young woman at gunpoint, shot both the woman and her companion while they were tied helplessly to trees with the announced intention of killing them, and left them for dead. Even with these horrible facts before it, this so-called "prosecution-prone," "callous," and "uncharitable" jury refused to allow imposition of the death penalty and recommended life imprisonment instead. In these circumstances, where the real reason for granting certiorari in the case has disappeared, it seems to me that the Court should dismiss the petition as improvidently granted. This is especially true here, where, as I point out at the end of this opinion, there is an open-and-shut case of guilt, and the petitioner received the lightest sentence available under state law.

II.

Passing over the jury issue, the Court still reverses the conviction in this case and sends it back for a new trial on the ground that the rifle, which the record shows was used to shoot the victims, and which is held by the majority to have been obtained through an unconstitutional search and seizure, was admitted into evidence at petitioner's trial. One of the reasons that I cannot agree with the Court's reversal is because I believe the searching officers had valid permission to conduct their search. The facts surrounding the search are these: Petitioner had been raised by his grandmother, Mrs. Hattie Leath, with whom he was living at the time the rape and assaults were committed. Shortly after the victims were able to recount to the police what had happened to them, the county sheriff, with two of his deputies and a state police officer, went to Mrs. Leath's

[3] See N. C. Gen. Stat. § 14–21. The Court imposed additional sentences of 10 years' imprisonment, to run consecutively, on the two felonious assault charges.

house. One of the deputies went up on the porch of the house and stated to Mrs. Leath, who was standing inside the screen door, that he had a warrant to search her house. He did not appear to have any paper in his hand, and he did not read anything to her. Mrs. Leath's *immediate* response, without mentioning anything about a warrant or asking to see it or read it or have it read to her, was to tell the deputy "to come on in." At the trial Mrs. Leath described her reaction to the visit of the law officers as follows:

> "He did tell me he had a search warrant. I don't know if Sheriff Stockard was with him. I was not paying much attention. I told Mr. Stockard [after he had come up on the porch] to go ahead and look all over the house. I had no objection to them making a search of my house. I was willing to let them look in any room or drawer in my house they wanted to. Nobody threatened me with anything. Nobody told me they were going to hurt me if I didn't let them search my house. Nobody told me they would give me any money if I would let them search. I let them search, and *it was all my own free will.* Nobody forced me at all." (Emphasis added.)

My study of the record in this case convinces me that Mrs. Leath voluntarily consented to this search,[4] and in fact that she actually wanted the officers to search her house—to prove to them that she had nothing to hide. Mrs. Leath's readiness to permit the search was the action of a person so conscious of her innocence, so proud of her own home,[5] that she was not going to require

[4] Mrs. Leath's voluntary consent was sufficient to validate the search since she owned the house which was searched and the rifle that was taken. It should also be noted that the rifle was not found in petitioner's private room, nor in any part of the house assigned to him, but in the kitchen behind the door.

[5] Mrs. Leath owned the house in which she was living and throughout her questioning repeatedly referred to "my house."

a search warrant, thus indicating a doubt about the rectitude of her household. There are such people in this world of ours,[6] and the evidence in this case causes me to believe Mrs. Leath is one of them. As she herself testified, "I just give them a free will to look because I felt like the boy wasn't guilty."

Despite the statements of Mrs. Leath cited above, and despite the clear finding of consent by the trial judge, who personally saw and heard Mrs. Leath testify,[7] this Court, refusing to accept Mrs. Leath's sworn testimony that she did freely consent and overruling the trial judge's findings, concludes on its own that she did not consent. I do not believe the Court should substitute what it believes Mrs. Leath should have said for what she actually said—"it was all my own free will." I cannot accept what I believe to be an unwarranted conclusion by the Court.

III.

Even assuming for the purposes of argument that there was no consent to search and that the rifle which was

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[6] See *Commonwealth* v. *Tucker*, 189 Mass. 457, 469, 76 N. E. 127, 131. In this case a mother consented for officers who were looking for broken pieces of a knife used in a murder to search her home. The Court found that officers went "to the door of the house where Tucker resided, and stated to his mother, at the outside door of the house, that they had this search warrant to search for the article named therein . . . that she . . . invited the officers to make all the search they desired, saying that she knew her son to be innocent; and thereupon the officers made search, not upon the warrant, but in consequence of her invitation . . . ." The knife blade was admitted against the contention that it was barred by the Fourth and Fourteenth Amendments.

[7] The finding of the court was as follows: "The Court finds that from the evidence of Mrs. Hattie Leath that it is of a clear and convincing nature that she, the said Mrs. Hattie Leath, voluntarily consented to the search of her premises, as is more particularly set forth in her evidence, and that that consent was specifically given and is not the result of coercion from the officers."

seized from Mrs. Leath's house should not have been admitted into evidence, I still believe the conviction should stand. For the overwhelming evidence in this case, even when the rifle and related testimony are excluded, amply demonstrates petitioner's guilt. Unfortunately, to show this, it is necessary to go into the sordid facts of the case. The victims were a young man and his girl friend. At trial both testified in detail to the following: They were parked shortly after dusk on a country road not far from where the petitioner Bumper lived. Bumper approached the car, stuck a rifle barrel up to the window and ordered the girl to get out of the car, indicating that if she refused he would shoot her. Both got out of the car and Bumper ordered the girl to undress, stating that "I want a white girl's p——." When the girl adamantly refused, Bumper pointed the rifle at the young man, and the girl, understanding that she must submit or her boy friend would be killed, followed Bumper's orders. Bumper then forced the young man into the rear seat of the car, requiring him to stay down on the floor, while Bumper raped the girl on the back of the car. A short time after this, Bumper forced the couple to drive to another spot. Here he made them get out of the car and walk down a dirt road into some bushes. At this time Bumper told the couple he was going to kill them, and when they pleaded with him to let them go, he replied, "I can't do it; you will go to the cops." The couple then suggested that if Bumper would tie them up and blindfold them that he could get away with no problem. This Bumper did, tying each to a separate tree. But he did not leave. Instead he raped the girl again while she was tied to the tree. After this, Bumper went over to the young man and felt his chest, asking him where his heart was and if he was scared. He then cooly proceeded to shoot the young man where he thought his heart was. The girl, tied to the tree and

blindfolded, heard the shot, and a moment later herself was shot through the left breast close to her heart. Bumper then took the car and drove away, obviously believing he had killed the young couple. They were able to free themselves, however, and with much difficulty made their way to a nearby house where the owner got them to a hospital.[8] The time during which the couple was held captive was approximately an hour and a half. During that time they clearly got to know who their assailant was. Both got a plain view of Bumper right at the beginning of their ordeal when they opened the car doors and saw his face in the light coming from the inside of the car. Moreover, the undisputed evidence in the record shows that the night of the attack was a bright moonlit night. Both testified positively at trial that it was Bumper.[9] Also there was substantial corroborating evidence outside of that relating to the rifle. Here we have the clear and convincing testimony of the two victims, whose characters were in no way impeached or challenged. The only witnesses at the trial were state

[8] It was on these facts and this testimony, it must be remembered, that this jury, selected in the way *Witherspoon* holds is designed to produce a "hanging" jury, recommended a life sentence for petitioner.

[9] The Court's opinion attempts to convey the impression that the victims were not sure of their assailant's identification because of an alleged mistake during a police lineup. See majority opinion, n. 16. This completely overlooks the fact, however, that before Bumper was arrested, and before the victims had any idea of their attacker's name or where he was from, the girl, while still in the hospital, identified Bumper's picture from a number of others. The young man also had identified Bumper's picture days before the lineup was held. After the girl went through the lineup the first time she confessed that she was too scared to look at the men and that she had made no real attempt at identification. And it should not be forgotten that she testified positively under oath at trial that "In my own mind I am certain [that Bumper was my assailant], and nothing could really dissuade me from it. I haven't made up my mind; I know."

witnesses (the two victims plus medical and police testimony), and none of their testimony was refuted or denied in any way. Thus, this is a case where every word of evidence introduced at trial pointed to guilt, and there was no challenge to the truthfulness of the State's evidence, nor to the character of any of its witnesses. Yet even with all this, the Court persists in reversing the case, thus requiring the State to hold a new trial if it wishes to punish Bumper for his crimes.

When it is clear beyond all shadow of a doubt, as here, that a defendant committed the crimes charged, I do not believe that this Court should enforce on the States a *"per se"* rule automatically requiring a new trial in every case where this Court concludes that some part of the evidence was obtained by an unreasonable search and seizure. The primary reason the "exclusionary rule" was adopted by this Court was to deter unreasonable searches and seizures in violation of the Fourth Amendment. *Mapp* v. *Ohio,* 367 U. S. 643. But see my concurring opinion at 661–666. I believe that the deterrence desired by some can be served adequately without blind adherence to a mechanical formula that requires automatic reversal in every case where the exclusionary rule is violated. While little is known about the effect the exclusionary rule really has on actual police practices, I think it is a fair assumption that refusal to reverse a conviction of a defendant, because of the admission of illegally seized evidence, where other evidence conclusively demonstrates his guilt, is not going to lessen police sensitivity to the exclusionary rule, thereby reducing its deterrent effect. Obviously at the time a search is carried out the police are not going to know whether the evidence they hope to obtain is going to be necessary for the prosecution's case, and, of course, if they know it will not be necessary, no search is needed. Thus the only effect of not automatically reversing all cases in which there

has been a violation of the exclusionary rule will be to allow state convictions of obviously guilty defendants to stand. And they should stand.

IV.

In this case, as I have shown, the evidence of the two victims points positively to guilt without any doubt. When there is added to this the fact that the rifle, from which came the bullets which went into the bodies of the two victims, was found where Bumper lived, which was not far from the scene of the assault, this makes, as the North Carolina Supreme Court pointed out, assurance doubly sure. Whether one views the evidence of guilt with or without the rifle, the conclusion is inescapable that this defendant committed the crimes for which the jury convicted him. In these circumstances no State should be forced to give a new trial; justice does not require it.[10]

MR. JUSTICE WHITE, dissenting.

When "consent" to a search is given after the occupant has been told by police officers that they have a warrant for the search, it seems reasonable to me for Fourth Amendment purposes to view the consent as conditioned on there being a valid warrant, absent clear proof that the consent was actually unconditional. The evidence in this record does not show unconditional consent with sufficient clarity, and perhaps this would be the result in most cases. But this does not mean that

[10] 28 U. S. C. § 2106 provides: "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had *as may be just under the circumstances.*" (Emphasis added.)

every search following conditional consent is invalid. If upon a motion to suppress or upon an objection to evidence offered at the trial, the State produces a valid warrant for the search, there is no good reason to exclude the evidence simply because police at the time of the search relied on the consent and neither served nor returned the warrant. In the case before us the State represented in this Court that there was a warrant for the challenged search. Unlike the Court and MR. JUSTICE HARLAN, I would not brush this matter aside. Since the existence and validity of the warrant have not been determined in the state courts, the case is not ripe for reversal or affirmance. I would therefore not reverse, but vacate, this conviction, returning the case to the state courts for a determination of the validity of the warrant. If because of the absence of probable cause, or for some other reason, the warrant would not have been a proper predicate for the search, *Mapp* v. *Ohio*, 367 U. S. 643 (1961), would require reversal of the conviction unless it is saved under the harmless-error rule of *Chapman* v. *California*, 386 U. S. 18 (1967).*

*Of course, if it was determined that the grandmother's consent was not good against petitioner, who had standing to raise the validity of the search, it would be unnecessary to deal with the issues which have been argued and determined in this case.

Syllabus.

PICKERING *v.* BOARD OF EDUCATION OF TOWNSHIP HIGH SCHOOL DISTRICT 205, WILL COUNTY.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

No. 510. Argued March 27, 1968.—Decided June 3, 1968.

Appellee, Board of Education, dismissed appellant, a teacher, for writing and publishing in a newspaper a letter criticizing the Board's allocation of school funds between educational and athletic programs and the Board's and superintendent's methods of informing, or preventing the informing of, the school district's taxpayers of the real reasons why additional tax revenues were being sought for the schools. At a hearing the Board charged that numerous statements in the letter were false and that the publication of the statements unjustifiably impugned the Board and school administration. The Board found all the statements false as charged and concluded that publication of the letter was "detrimental to the efficient operation and administration of the schools of the district" and that "the interests of the school require[d] [appellant's dismissal]" under the applicable statute. There was no evidence at the hearing as to the effect of appellant's statements on the community or school administration. The Illinois courts, reviewing the proceedings solely to determine whether the Board's findings were supported by substantial evidence and whether the Board could reasonably conclude that the publication was "detrimental to the best interests of the schools," upheld the dismissal, rejecting appellant's claim that the letter was protected by the First and Fourteenth Amendments, on the ground that as a teacher he had to refrain from making statements about the schools' operation "which in the absence of such position he would have an undoubted right to engage in." *Held:*

1. "[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." *Keyishian* v. *Board of Regents*, 385 U. S. 589, 605–606 (1967). The teacher's interest as a citizen in making public comment must be balanced against the State's interest in promoting the efficiency of its employees' public services. P. 568.

2. Those statements of appellant's which were substantially correct regarded matters of public concern and presented no questions

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of faculty discipline or harmony; hence those statements afforded no proper basis for the Board's action in dismissing appellant. Pp. 569–570.

3. Appellant's statements which were false likewise concerned issues then currently the subject of public attention and were neither shown nor could be presumed to have interfered with appellant's performance of his teaching duties or the schools' general operation. They were thus entitled to the same protection as if they had been made by a member of the general public, and, absent proof that those false statements were knowingly or recklessly made, did not justify the Board in dismissing appellant from public employment. *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964). Pp. 570–575.

36 Ill. 2d 568, 225 N. E. 2d 1, reversed and remanded.

John Ligtenberg argued the cause for appellant. With him on the briefs was *Andrew J. Leahy.*

John F. Cirricione argued the cause and filed a brief for appellee.

Milton I. Shadur filed a brief for the American Civil Liberties Union, Illinois Division, as *amicus curiae,* urging reversal.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Appellant Marvin L. Pickering, a teacher in Township High School District 205, Will County, Illinois, was dismissed from his position by the appellee Board of Education for sending a letter to a local newspaper in connection with a recently proposed tax increase that was critical of the way in which the Board and the district superintendent of schools had handled past proposals to raise new revenue for the schools. Appellant's dismissal resulted from a determination by the Board, after a full hearing, that the publication of the letter was "detrimental to the efficient operation and administration of the schools of the district" and hence, under the rele-

vant Illinois statute, Ill. Rev. Stat., c. 122, § 10–22.4 (1963), that "interests of the school require[d] [his dismissal]."

Appellant's claim that his writing of the letter was protected by the First and Fourteenth Amendments was rejected. Appellant then sought review of the Board's action in the Circuit Court of Will County, which affirmed his dismissal on the ground that the determination that appellant's letter was detrimental to the interests of the school system was supported by substantial evidence and that the interests of the schools overrode appellant's First Amendment rights. On appeal, the Supreme Court of Illinois, two Justices dissenting, affirmed the judgment of the Circuit Court. 36 Ill. 2d 568, 225 N. E. 2d 1 (1967). We noted probable jurisdiction of appellant's claim that the Illinois statute permitting his dismissal on the facts of this case was unconstitutional as applied under the First and Fourteenth Amendments.[1] 389 U. S. 925 (1967). For the reasons detailed below we agree that appellant's rights to freedom of speech were violated and we reverse.

I.

In February of 1961 the appellee Board of Education asked the voters of the school district to approve a bond issue to raise $4,875,000 to erect two new schools. The proposal was defeated. Then, in December of 1961, the Board submitted another bond proposal to the voters which called for the raising of $5,500,000 to build two new schools. This second proposal passed and the schools were built with the money raised by the bond

[1] Appellant also challenged the statutory standard on which the Board based his dismissal as vague and overbroad. See *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967); *NAACP* v. *Button*, 371 U. S. 415 (1963); *Shelton* v. *Tucker*, 364 U. S. 479 (1960). Because of our disposition of this case we do not reach appellant's challenge to the statute on its face.

sales. In May of 1964 a proposed increase in the tax rate to be used for educational purposes was submitted to the voters by the Board and was defeated. Finally, on September 19, 1964, a second proposal to increase the tax rate was submitted by the Board and was likewise defeated. It was in connection with this last proposal of the School Board that appellant wrote the letter to the editor (which we reproduce in an Appendix to this opinion) that resulted in his dismissal.

Prior to the vote on the second tax increase proposal a variety of articles attributed to the District 205 Teachers' Organization appeared in the local paper. These articles urged passage of the tax increase and stated that failure to pass the increase would result in a decline in the quality of education afforded children in the district's schools. A letter from the superintendent of schools making the same point was published in the paper two days before the election and submitted to the voters in mimeographed form the following day. It was in response to the foregoing material, together with the failure of the tax increase to pass, that appellant submitted the letter in question to the editor of the local paper.

The letter constituted, basically, an attack on the School Board's handling of the 1961 bond issue proposals and its subsequent allocation of financial resources between the schools' educational and athletic programs. It also charged the superintendent of schools with attempting to prevent teachers in the district from opposing or criticizing the proposed bond issue.

The Board dismissed Pickering for writing and publishing the letter. Pursuant to Illinois law, the Board was then required to hold a hearing on the dismissal. At the hearing the Board charged that numerous statements in the letter were false and that the publication

of the statements unjustifiably impugned the "motives, honesty, integrity, truthfulness, responsibility and competence" of both the Board and the school administration. The Board also charged that the false statements damaged the professional reputations of its members and of the school administrators, would be disruptive of faculty discipline, and would tend to foment "controversy, conflict and dissension" among teachers, administrators, the Board of Education, and the residents of the district. Testimony was introduced from a variety of witnesses on the truth or falsity of the particular statements in the letter with which the Board took issue. The Board found the statements to be false as charged. No evidence was introduced at any point in the proceedings as to the effect of the publication of the letter on the community as a whole or on the administration of the school system in particular, and no specific findings along these lines were made.

The Illinois courts reviewed the proceedings solely to determine whether the Board's findings were supported by substantial evidence and whether, on the facts as found, the Board could reasonably conclude that appellant's publication of the letter was "detrimental to the best interests of the schools." Pickering's claim that his letter was protected by the First Amendment was rejected on the ground that his acceptance of a teaching position in the public schools obliged him to refrain from making statements about the operation of the schools "which in the absence of such position he would have an undoubted right to engage in." It is not altogether clear whether the Illinois Supreme Court held that the First Amendment had no applicability to appellant's dismissal for writing the letter in question or whether it determined that the particular statements made in the letter were not entitled to First Amendment protection.

In any event, it clearly rejected Pickering's claim that, on the facts of this case, he could not constitutionally be dismissed from his teaching position.

II.

To the extent that the Illinois Supreme Court's opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court. *E. g., Wieman* v. *Updegraff*, 344 U. S. 183 (1952); *Shelton* v. *Tucker*, 364 U. S. 479 (1960); *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967). "[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." *Keyishian* v. *Board of Regents, supra,* at 605–606. At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

III.

The Board contends that "the teacher by virtue of his public employment has a duty of loyalty to support his superiors in attaining the generally accepted goals of education and that, if he must speak out publicly, he should do so factually and accurately, commensurate with

his education and experience." Appellant, on the other hand, argues that the test applicable to defamatory statements directed against public officials by persons having no occupational relationship with them, namely, that statements to be legally actionable must be made "with knowledge that [they were] . . . false or with reckless disregard of whether [they were] . . . false or not," *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 280 (1964), should also be applied to public statements made by teachers. Because of the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors, against whom the statements are directed, to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged. However, in the course of evaluating the conflicting claims of First Amendment protection and the need for orderly school administration in the context of this case, we shall indicate some of the general lines along which an analysis of the controlling interests should run.

An examination of the statements in appellant's letter objected to by the Board [2] reveals that they, like the letter as a whole, consist essentially of criticism of the Board's allocation of school funds between educational and athletic programs, and of both the Board's and the superintendent's methods of informing, or preventing the informing of, the district's taxpayers of the real reasons why additional tax revenues were being sought for the schools. The statements are in no way directed towards any person with whom appellant would normally be in

[2] We have set out in the Appendix our detailed analysis of the specific statements in appellant's letter which the Board found to be false, together with our reasons for concluding that several of the statements were, contrary to the findings of the Board, substantially correct.

contact in the course of his daily work as a teacher. Thus no question of maintaining either discipline by immediate superiors or harmony among coworkers is presented here. Appellant's employment relationships with the Board and, to a somewhat lesser extent, with the superintendent are not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning. Accordingly, to the extent that the Board's position here can be taken to suggest that even comments on matters of public concern that are substantially correct, such as statements (1)–(4) of appellant's letter, see Appendix, *infra*, may furnish grounds for dismissal if they are sufficiently critical in tone, we unequivocally reject it.[3]

We next consider the statements in appellant's letter which we agree to be false. The Board's original charges included allegations that the publication of the letter damaged the professional reputations of the Board and the superintendent and would foment controversy and conflict among the Board, teachers, administrators, and the residents of the district. However, no evidence to support these allegations was introduced at the hearing. So far as the record reveals, Pickering's letter was greeted by everyone but its main target, the Board, with massive apathy and total disbelief. The Board must, therefore,

[3] It is possible to conceive of some positions in public employment in which the need for confidentiality is so great that even completely correct public statements might furnish a permissible ground for dismissal. Likewise, positions in public employment in which the relationship between superior and subordinate is of such a personal and intimate nature that certain forms of public criticism of the superior by the subordinate would seriously undermine the effectiveness of the working relationship between them can also be imagined. We intimate no views as to how we would resolve any specific instances of such situations, but merely note that significantly different considerations would be involved in such cases.

have decided, perhaps by analogy with the law of libel, that the statements were *per se* harmful to the operation of the schools.

However, the only way in which the Board could conclude, absent any evidence of the actual effect of the letter, that the statements contained therein were *per se* detrimental to the interest of the schools was to equate the Board members' own interests with that of the schools. Certainly an accusation that too much money is being spent on athletics by the administrators of the school system (which is precisely the import of that portion of appellant's letter containing the statements that we have found to be false, see Appendix, *infra*) cannot reasonably be regarded as *per se* detrimental to the district's schools. Such an accusation reflects rather a difference of opinion between Pickering and the Board as to the preferable manner of operating the school system, a difference of opinion that clearly concerns an issue of general public interest.

In addition, the fact that particular illustrations of the Board's claimed undesirable emphasis on athletic programs are false would not normally have any necessary impact on the actual operation of the schools, beyond its tendency to anger the Board. For example, Pickering's letter was written after the defeat at the polls of the second proposed tax increase. It could, therefore, have had no effect on the ability of the school district to raise necessary revenue, since there was no showing that there was any proposal to increase taxes pending when the letter was written.

More importantly, the question whether a school system requires additional funds is a matter of legitimate public concern on which the judgment of the school administration, including the School Board, cannot, in a society that leaves such questions to popular vote, be taken as conclusive. On such a question free and open

debate is vital to informed decision-making by the electorate. Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.

In addition, the amounts expended on athletics which Pickering reported erroneously were matters of public record on which his position as a teacher in the district did not qualify him to speak with any greater authority than any other taxpayer. The Board could easily have rebutted appellant's errors by publishing the accurate figures itself, either via a letter to the same newspaper or otherwise. We are thus not presented with a situation in which a teacher has carelessly made false statements about matters so closely related to the day-to-day operations of the schools that any harmful impact on the public would be difficult to counter because of the teacher's presumed greater access to the real facts. Accordingly, we have no occasion to consider at this time whether under such circumstances a school board could reasonably require that a teacher make substantial efforts to verify the accuracy of his charges before publishing them.[4]

What we do have before us is a case in which a teacher has made erroneous public statements upon issues then currently the subject of public attention, which are critical of his ultimate employer but which are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in

[4] There is likewise no occasion furnished by this case for consideration of the extent to which teachers can be required by narrowly drawn grievance procedures to submit complaints about the operation of the schools to their superiors for action thereon prior to bringing the complaints before the public.

the classroom[5] or to have interfered with the regular operation of the schools generally. In these circumstances we conclude that the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public.

IV.

The public interest in having free and unhindered debate on matters of public importance—the core value of the Free Speech Clause of the First Amendment—is so great that it has been held that a State cannot authorize the recovery of damages by a public official for defamatory statements directed at him except when such statements are shown to have been made either with knowledge of their falsity or with reckless disregard for their truth or falsity. *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964); *St. Amant* v. *Thompson*, 390 U. S. 727 (1968). Compare *Linn* v. *United Plant Guard Workers*, 383 U. S. 53 (1966). The same test has been applied to suits for invasion of privacy based on false statements where a "matter of public interest" is involved. *Time, Inc.* v. *Hill*, 385 U. S. 374 (1967). It is therefore perfectly clear that, were appellant a member of the general public, the State's power to afford the appellee Board of Education or its members any legal right to sue him for writing the letter at issue here would be limited by the requirement that the letter be judged by the standard laid down in *New York Times*.

[5] We also note that this case does not present a situation in which a teacher's public statements are so without foundation as to call into question his fitness to perform his duties in the classroom. In such a case, of course, the statements would merely be evidence of the teacher's general competence, or lack thereof, and not an independent basis for dismissal.

This Court has also indicated, in more general terms, that statements by public officials on matters of public concern must be accorded First Amendment protection despite the fact that the statements are directed at their nominal superiors. *Garrison* v. *Louisiana*, 379 U. S. 64 (1964); *Wood* v. *Georgia*, 370 U. S. 375 (1962). In *Garrison*, the *New York Times* test was specifically applied to a case involving a criminal defamation conviction stemming from statements made by a district attorney about the judges before whom he regularly appeared.

While criminal sanctions and damage awards have a somewhat different impact on the exercise of the right to freedom of speech from dismissal from employment, it is apparent that the threat of dismissal from public employment is nonetheless a potent means of inhibiting speech. We have already noted our disinclination to make an across-the-board equation of dismissal from public employment for remarks critical of superiors with awarding damages in a libel suit by a public official for similar criticism. However, in a case such as the present one, in which the fact of employment is only tangentially and insubstantially involved in the subject matter of the public communication made by a teacher, we conclude that it is necessary to regard the teacher as the member of the general public he seeks to be.

In sum, we hold that, in a case such as this, absent proof of false statements knowingly or recklessly made by him,[6] a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment. Since no

[6] Because we conclude that appellant's statements were not knowingly or recklessly false, we have no occasion to pass upon the additional question whether a statement that was knowingly or recklessly false would, if it were neither shown nor could reasonably be presumed to have had any harmful effects, still be protected by the First Amendment. See also n. 5, *supra*.

such showing has been made in this case regarding appellant's letter, see Appendix, *infra*, his dismissal for writing it cannot be upheld and the judgment of the Illinois Supreme Court must, accordingly, be reversed and the case remanded for further proceedings not inconsistent with this opinion. *It is so ordered.*

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK joins, concurs in the judgment of the Court for the reasons set out in his concurring opinions in *Time, Inc.* v. *Hill*, 385 U. S. 374, 401, *Rosenblatt* v. *Baer*, 383 U. S. 75, 88, and *Garrison* v. *Louisiana*, 379 U. S. 64, 80, and in the separate opinions of MR. JUSTICE BLACK in *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130, 170, and *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 293.

APPENDIX TO OPINION OF THE COURT.

A. *Appellant's letter.*

LETTERS TO THE EDITOR

**** Graphic Newspapers, Inc.
Thursday, September 24, 1964, Page 4

Dear Editor:

I enjoyed reading the back issues of your paper which you loaned to me. Perhaps others would enjoy reading them in order to see just how far the two new high schools have deviated from the original promises by the Board of Education. First, let me state that I am referring to the February thru November, 1961 issues of your paper, so that it can be checked.

One statement in your paper declared that swimming pools, athletic fields, and auditoriums had been left out of the program. They may have been left out but they got put back in very quickly because Lockport West has both an auditorium and athletic field. In fact, Lockport West has a better athletic field than Lockport Central. It has a track that isn't quite regulation distance even

though the board spent a few thousand dollars on it. Whose fault is that? Oh, I forgot, it wasn't supposed to be there in the first place. It must have fallen out of the sky. Such responsibility has been touched on in other letters but it seems one just can't help noticing it. I am not saying the school shouldn't have these facilities, because I think they should, but promises are promises, or are they?

Since there seems to be a problem getting all the facts to the voter on the twice defeated bond issue, many letters have been written to this paper and probably more will follow, I feel I must say something about the letters and their writers. Many of these letters did not give the whole story. Letters by your Board and Administration have stated that teachers' salaries total $1,297,746 for one year. Now that must have been the total payroll, otherwise the teachers would be getting $10,000 a year. I teach at the high school and I know this just isn't the case. However, this shows their "stop at nothing" attitude. To illustrate further, do you know that the superintendent told the teachers, and I quote, "Any teacher that opposes the referendum should be prepared for the consequences." I think this gets at the reason we have problems passing bond issues. Threats take something away; these are insults to voters in a free society. We should try to sell a program on its merits, if it has any.

Remember those letters entitled "District 205 Teachers Speak," I think the voters should know that those letters have been written and agreed to by only five or six teachers, not 98% of the teachers in the high school. In fact, many teachers didn't even know who was writing them. Did you know that those letters had to have the approval of the superintendent before they could be put in the paper? That's the kind of totalitarianism teach-

ers live in at the high school, and your children go to school in.

In last week's paper, the letter written by a few uninformed teachers threatened to close the school cafeteria and fire its personnel. This is ridiculous and insults the intelligence of the voter because properly managed school cafeterias do not cost the school district any money. If the cafeteria is losing money, then the board should not be packing free lunches for athletes on days of athletic contests. Whatever the case, the taxpayer's child should only have to pay about 30¢ for his lunch instead of 35¢ to pay for free lunches for the athletes.

In a reply to this letter your Board of Administration will probably state that these lunches are paid for from receipts from the games. But $20,000 in receipts doesn't pay for the $200,000 a year they have been spending on varsity sports while neglecting the wants of teachers.

You see we don't need an increase in the transportation tax unless the voters want to keep paying $50,000 or more a year to transport athletes home after practice and to away games, etc. Rest of the $200,000 is made up in coaches' salaries, athletic directors' salaries, baseball pitching machines, sodded football fields, and thousands of dollars for other sports equipment.

These things are all right, provided we have enough money for them. To sod football fields on borrowed money and then not be able to pay teachers' salaries is getting the cart before the horse.

If these things aren't enough for you, look at East High. No doors on many of the classrooms, a plant room without any sunlight, no water in a first aid treatment room, are just a few of many things. The taxpayers were really taken to the cleaners. A part of the sidewalk in front of the building has already collapsed. Maybe Mr. Hess would be interested to know that we need blinds on the windows in that building also.

Once again, the board must have forgotten they were going to spend $3,200,000 on the West building and $2,300,000 on the East building.

As I see it, the bond issue is a fight between the Board of Education that is trying to push tax-supported athletics down our throats with education, and a public that has mixed emotions about both of these items because they feel they are already paying enough taxes, and simply don't know whom to trust with any more tax money.

I must sign this letter as a citizen, taxpayer and voter, not as a teacher, since that freedom has been taken from the teachers by the administration. Do you really know what goes on behind those stone walls at the high school?

Respectfully,

Marvin L. Pickering.

B. *Analysis.*

The foregoing letter contains eight principal statements which the Board found to be false.[1] Our independent review of the record [2] convinces us that Justice

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[1] We shall not bother to enumerate some of the statements which the Board found to be false because their triviality is so readily apparent that the Board could not rationally have considered them as detrimental to the interests of the schools regardless of their truth or falsity.

[2] This Court has regularly held that where constitutional rights are in issue an independent examination of the record will be made in order that the controlling legal principles may be applied to the actual facts of the case. *E. g., Norris* v. *Alabama,* 294 U. S. 587 (1935); *Pennekamp* v. *Florida,* 328 U. S. 331 (1946); *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 285 (1964). However, even in cases where the upholding or rejection of a constitutional claim turns on the resolution of factual questions, we also consistently give great, if not controlling, weight to the findings of the state courts. In the present case the trier of fact was the same body that was also both the victim of appellant's statements and the

Schaefer was correct in his dissenting opinion in this case when he concluded that many of appellant's statements which were found by the Board to be false were in fact substantially correct. We shall deal with each of the statements found to be false in turn. (1) Appellant asserted in his letter that the two new high schools when constructed deviated substantially from the original promises made by the Board during the campaign on the bond issue about the facilities they would contain. The Board based its conclusion that this statement was false on its determination that the promises referred to were those made in the campaign to pass the second bond issue in December of 1961. In the campaign on the first bond issue the Board stated that the plans for the two schools did not include such items as swimming pools, auditoriums, and athletic fields. The publicity put out by the Board on the second bond issue mentioned nothing about the addition of an auditorium to the plans and also mentioned nothing specific about

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prosecutor that brought the charges aimed at securing his dismissal. The state courts made no independent review of the record but simply contented themselves with ascertaining, in accordance with statute, whether there was substantial evidence to support the Board's findings.

Appellant requests us to reverse the state courts' decisions upholding his dismissal on the independent ground that the procedure followed above deprived him of due process in that he was not afforded an impartial tribunal. However, appellant makes this contention for the first time in this Court, not having raised it at any point in the state proceedings. Because of this, we decline to treat appellant's claim as an independent ground for our decision in this case. On the other hand, we do not propose to blind ourselves to the obvious defects in the fact-finding process occasioned by the Board's multiple functioning *vis-à-vis* appellant. Compare *Tumey* v. *Ohio*, 273 U. S. 510 (1927); *In re Murchison*, 349 U. S. 133 (1955). Accordingly, since the state courts have at no time given *de novo* consideration to the statements in the letter, we feel free to examine the evidence in this case completely independently and to afford little weight to the factual determinations made by the Board.

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athletic fields, although a general reference to "state required physical education" facilities was included that was similar to a reference made in the material issued by the Board during the first campaign.

In sum, the Board first stated that certain facilities were not to be included in the new high schools as an economy measure, changed its mind after the defeat of the first bond issue and decided to include some of the facilities previously omitted, and never specifically or even generally indicated to the taxpayers the change. Appellant's claim that the original plans, as disclosed to the public, deviated from the buildings actually constructed is thus substantially correct and his characterization of the Board's prior statement as a "promise" is fair as a matter of opinion. The Board's conclusion to the contrary based on its determination that appellant's statement referred only to the literature distributed during the second bond issue campaign is unreasonable in that it ignores the word "original" that modifies "promises" in appellant's letter.

(2) Appellant stated that the Board incorrectly informed the public that "teachers' salaries" total $1,297,746 per year. The Board found that statement false. However, the superintendent of schools admitted that the only way the Board's figure could be regarded as accurate was to change the word "teachers" to "instructional" whereby the salaries of deans, principals, librarians, counselors, and four secretaries at each of the district's three high schools would be included in the total. Appellant's characterization of the Board's figure as incorrect is thus clearly accurate.

(3) Pickering claimed that the superintendent had said that any teacher who did not support the 1961 bond issue referendum should be prepared for the consequences. The Board found this claim false. However, the statement was corroborated by the testimony of two other teachers, although the superintendent denied making the

remark attributed to him. The Illinois Supreme Court appears to have agreed that something along the lines stated by appellant was said, since it relied, in upholding the Board's finding that appellant's version of the remark was false, on testimony by one of the two teachers that he interpreted the remark to be a prediction about the adverse consequences for the schools should the referendum not pass rather than a threat against noncooperation by teachers. However, the other teacher testified that he didn't know how to interpret the remark. Accordingly, while appellant may have misinterpreted the meaning of the remark, he did not misreport it.

(4) Appellant's letter stated that letters from teachers to newspapers had to have the approval of the superintendent before they could be submitted for publication. The Board relied in finding this statement false on the testimony by the superintendent that no approval was required by him. However, the Handbook for Teachers of the district specifically stated at that time that material submitted to local papers should be checked with the building principal and submitted in triplicate to the publicity coordinator. In particular, the teachers' letters to which appellant was specifically referring in his own letter had in fact been submitted to the superintendent prior to their publication. Thus this statement is substantially correct.

The other four statements challenged by the Board, are factually incorrect in varying degrees. (5) Appellant's letter implied that providing athletes in the schools with free lunches meant that other students must pay 35¢ instead of 30¢ for their lunches. This statement is erroneous in that while discontinuing free lunches for athletes would have permitted some small decrease in the 35¢ charge for lunch to other students, the decrease would not have brought the price down to 30¢. (6) Appellant claimed that the Board had been spending $200,000 a year on athletics while neglecting the wants

of teachers. This claim is incorrect in that the $200,000 per year figure included over $130,000 of nonrecurring capital expenditures. (7) Appellant also claimed that the Board had been spending $50,000 a year on transportation for athletes. This claim is completely false in that the expenditures on travel for athletes per year were about $10,000. (8) Finally, appellant stated that football fields had been sodded on borrowed money, while the Board had been unable to pay teachers' salaries. This statement is substantially correct as to the football fields being sodded with borrowed money because the money spent was the proceeds of part of the bond issue, which can fairly be characterized as borrowed. It is incorrect insofar as it suggests that the district's teachers had actually not been paid upon occasion, but correct if taken to mean that the Board had at times some difficulty in obtaining the funds with which to pay teachers. The manner in which the last four statements are false is perfectly consistent with good-faith error, and there is no evidence in the record to show that anything other than carelessness or insufficient information was responsible for their being made.

MR. JUSTICE WHITE, concurring in part and dissenting in part.

The Court holds that truthful statements by a school teacher critical of the school board are within the ambit of the First Amendment. So also are false statements innocently or negligently made. The State may not fire the teacher for making either unless, as I gather it, there are special circumstances, not present in this case, demonstrating an overriding state interest, such as the need for confidentiality or the special obligations which a teacher in a particular position may owe to his superiors.[1]

[1] See *ante*, at 569–570, 572 and nn. 3, 4. The Court does not elaborate upon its suggestion that there may be situations in which, with

The core of today's decision is the holding that Pickering's discharge must be tested by the standard of *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964). To this extent I am in agreement.

The Court goes on, however, to reopen a question I had thought settled by *New York Times* and the cases that followed it, particularly *Garrison* v. *Louisiana*, 379 U. S. 64 (1964). The Court devotes several pages to reexamining the facts in order to reject the determination below that Pickering's statements harmed the school system, *ante*, at 570–573, when the question of harm is clearly irrelevant given the Court's determination that Pickering's statements were neither knowingly nor recklessly false and its ruling that in such circumstances a teacher may not be fired even if the statements are injurious. The Court then gratuitously suggests that when statements are found to be knowingly or recklessly false, it is an open question whether the First Amendment still protects them unless they are shown or can be presumed to have caused harm. *Ante*, at 574, n. 6. Deliberate or reckless falsehoods serve no First Amendment ends and deserve no protection under that Amendment. The Court unequivocally recognized this in *Garrison*, where after reargument the Court said that "the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection." 379 U. S., at 75. The Court today neither

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reference to certain areas of public comment, a teacher may have special obligations to his superiors. It simply holds that in this case, with respect to the particular public comment made by Pickering, he is more like a member of the general public and, apparently, too remote from the school board to require placing him into any special category. Further, as I read the Court's opinion, it does not foreclose the possibility that under the First Amendment a school system may have an enforceable rule, applicable to teachers, that public statements about school business must first be submitted to the authorities to check for accuracy.

explains nor justifies its withdrawal from the firm stand taken in *Garrison*. As I see it, a teacher may be fired without violation of the First Amendment for knowingly or recklessly making false statements regardless of their harmful impact on the schools. As the Court holds, however, in the absence of special circumstances he may not be fired if his statements were true or only negligently false, even if there is some harm to the school system. I therefore see no basis or necessity for the Court's foray into fact-finding with respect to whether the record supports a finding as to injury.[2] If Pickering's false statements were either knowingly or recklessly made, injury to the school system becomes irrelevant, and the First Amendment would not prevent his discharge. For the State to be constitutionally precluded from terminating his employment, reliance on some other constitutional provision would be required.

Nor can I join the Court in its findings with regard to whether Pickering knowingly or recklessly published false statements. Neither the State in presenting its evidence nor the state tribunals in arriving at their findings and conclusions of law addressed themselves to the elements of the new standard which the Court holds the First Amendment to require in the circumstances of this case. Indeed, the state courts expressly rejected the applicability of both *New York Times* and *Garrison*. I find it wholly unsatisfactory for this Court to make the initial determination of knowing or reckless falsehood from the cold record now before us. It would be far more appropriate to remand this case to the state courts for further proceedings in light of the constitutional standard which the Court deems applicable to this case, once the relevant facts have been ascertained in appropriate proceedings.

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[2] Even if consideration of harm were necessary in this case, I could not join the Court in concluding on this record that harm to the school administration was not proved and could not be presumed.

SABBATH *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 898. Argued May 2, 1968.—Decided June 3, 1968.

One Jones was apprehended crossing the border from Mexico with cocaine, allegedly given to him by, and to be delivered to, "Johnny" in Los Angeles. Customs officers arranged for Jones to make delivery. Shortly after Jones entered "Johnny's" apartment, customs agents, without a warrant, knocked on the door, waited a few seconds, and, receiving no response, opened the unlocked door and entered. They arrested petitioner, searched the apartment, and found the cocaine and other items. The cocaine was introduced over objection at petitioner's trial for knowingly importing and concealing narcotics, and he was convicted. The Court of Appeals held that the agents did not "break open" the door within the meaning of 18 U. S. C. § 3109, which provides in part that an "officer may break open any outer or inner door or window of a house . . . to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him," and that they were therefore not required to make a prior announcement of "authority and purpose." *Held:*

1. The validity of an entry of a federal officer to effect a warrantless arrest "must be tested by criteria identical to those embodied in" 18 U. S. C. § 3109, which deals with an entry to execute a search warrant. *Miller* v. *United States*, 357 U. S. 301; *Wong Sun* v. *United States*, 371 U. S. 471. Pp. 588–589.

2. Section 3109, a codification of the common-law rule of announcement, basically proscribes an unannounced intrusion into a dwelling, which includes opening a closed but unlocked door. Pp. 589–591.

3. Whether or not exigent circumstances would excuse compliance with § 3109, here there were none, as the agents had no basis for assuming petitioner was armed or that he might resist arrest, or that Jones was in danger. P. 591.

380 F. 2d 108, reversed and remanded.

Murray H. Bring, by appointment of the Court, 390 U. S. 935, argued the cause and filed briefs for petitioner.

John S. Martin, Jr., argued the cause for the United States. On the brief were *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Kirby W. Patterson.*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

The issue in this case is whether petitioner's arrest was invalid because federal officers opened the closed but unlocked door of petitioner's apartment and entered in order to arrest him without first announcing their identity and purpose. We hold that the method of entry vitiated the arrest and therefore that evidence seized in the subsequent search incident thereto should not have been admitted at petitioner's trial.

On February 19, 1966, one William Jones was detained at the border between California and Mexico by United States customs agents, who found in his possession an ounce of cocaine. After some questioning, Jones told the agents that he had been given the narcotics in Tijuana, Mexico, by a person named "Johnny," whom he had accompanied there from Los Angeles. He said he was to transport the narcotics to "Johnny" in the latter city.

Also found in Jones' possession was a card on which was written the name "Johnny" and a Los Angeles telephone number. On the following day at about 3 p. m., Jones made a call to the telephone number listed on the card; a customs agent dialed the number, and with Jones' permission, listened to the ensuing conversation. A male voice answered the call, and Jones addressed the man as "Johnny." Jones said he was in San Diego, and still had "his thing." The man asked Jones if he had "any trouble getting through the line." Jones replied that he had not. Jones inquired whether "Johnny" planned to remain at home, and upon receiving an affirmative answer, indicated that he was on his way to Los Angeles, and would go to the man's apartment.

At about 7:30 that evening, the customs agents went with Jones to an apartment building in Los Angeles. The agents returned to Jones the cocaine they had seized from him, and placed a small broadcasting device on him. The agents waited outside the building, listening on a receiving apparatus. Jones knocked on the apartment door; a woman answered. Jones asked if "Johnny" was in, and was told to wait a minute. Steps were heard and then a man asked Jones something about "getting through the line." Because of noise from a phonograph in the apartment, reception from the broadcasting device on Jones' person was poor, but agents did hear the word "package."

The customs agents waited outside for five to 10 minutes, and then proceeded to the apartment door. One knocked, waited a few seconds, and, receiving no response, opened the unlocked door, and entered the apartment with his gun drawn. Other agents followed, at least one of whom also had his gun drawn. They saw petitioner sitting on a couch, in the process of withdrawing his hand from under the adjacent cushion. After placing petitioner under arrest, an agent found the package of cocaine under the cushion, and subsequently other items (*e. g.*, small pieces of tin foil) were found in the apartment; officers testified at trial they were adapted to packaging narcotics.

Petitioner and Jones were indicted for knowingly importing the cocaine into this country and concealing it, in violation of § 2 of the Narcotic Drugs Import and Export Act, as amended, 35 Stat. 614, 21 U. S. C. §§ 173 and 174. Petitioner was tried alone. The narcotics seized at petitioner's apartment were admitted into evidence, over objection. On appeal, following the conviction, the Court of Appeals for the Ninth Circuit ruled that the officers, in effecting entry to petitioner's apartment by opening the closed but unlocked door, did not "break open" the door within the meaning of 18

U. S. C. § 3109 and therefore were not required by that statute to make a prior announcement of "authority and purpose." 380 F. 2d 108. We granted certiorari, 389 U. S. 1003 (1967), to consider the somewhat uncomplicated but nonetheless significant issue of whether the agents' entry was consonant with federal law.[1] We hold that it was not, and therefore reverse.

The statute here involved, 18 U. S. C. § 3109,[2] deals with the entry of federal officers into a dwelling in terms only in regard to the execution of a search warrant. This Court has held, however, that the validity of such an entry of a federal officer to effect an arrest without a warrant "must be tested by criteria identical with those embodied in" that statute. *Miller* v. *United States*, 357 U. S. 301, 306 (1958); *Wong Sun* v. *United States*, 371 U. S. 471, 482–484 (1963).[3] We therefore agree with

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[1] The Government contends in this Court that petitioner did not adequately raise at trial the issue of the agents' manner of entry, and therefore that it did not have sufficient opportunity to indicate the full circumstances surrounding the entry and petitioner's arrest. However, petitioner's trial counsel, in the course of objecting, clearly stated there were no facts "sufficient to justify this officer's breaking into" the apartment, and his objection was truncated by a ruling of the trial judge. In any event, the Government met the issue on the merits in the Court of Appeals, and apparently did not there contend the record was inadequate for its resolution; and the Court of Appeals decided the issue on the merits. In these circumstances, we are justified in likewise doing so.

[2] "The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant."

[3] See also, *e. g.*, *Ng Pui Yu* v. *United States*, 352 F. 2d 626, 631 (C. A. 9th Cir. 1965); *Gatlin* v. *United States*, 117 U. S. App. D. C. 123, 130, 326 F. 2d 666, 673 (C. A. D. C. Cir. 1963); *United States* v. *Cruz*, 265 F. Supp. 15, 21 (W. D. Tex. 1967).

the parties and with the court below that we must look to § 3109 as controlling.

In *Miller* v. *United States, supra,* the common-law background to § 3109 was extensively examined.[4] The Court there concluded, *id.,* at 313:

> "The requirement of prior notice of authority and purpose before forcing entry into a home is deeply rooted in our heritage and should not be given grudging application. Congress, codifying a tradition embedded in Anglo-American law, had declared in § 3109 the reverence of the law for the individual's right of privacy in his house."

It was also noted, *id.,* at 313, n. 12, that another facet of the rule of announcement was, generally, to safeguard officers, who might be mistaken, upon an unannounced intrusion into a home, for someone with no right to be there. See also *McDonald* v. *United States,* 335 U. S. 451, 460–461 (concurring opinion).

Considering the purposes of § 3109, it would indeed be a "grudging application" to hold, as the Government urges, that the use of "force" is an indispensable element of the statute. To be sure, the statute uses the phrase "break open" and that connotes some use of force. But linguistic analysis seldom is adequate when a statute is designed to incorporate fundamental values and the ongoing development of the common law.[5] Thus, the

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[4] See also *Ker* v. *California,* 374 U. S. 23, 47–59 (1963) (opinion of BRENNAN, J.).

[5] While distinctions are obvious, a useful analogy is nonetheless afforded by the common and case law development of the law of burglary: a forcible entry has generally been eliminated as an element of that crime under statutes using the word "break," or similar words. See R. Perkins, Criminal Law 149–150 (1957); J. Michael & H. Wechsler, Criminal Law and Its Administration 367–382 (1940); Note, A Rationale of the Law of Burglary, 51 Col. L. Rev. 1009, 1012–1015 (1951). Commentators on the law of arrest have

California Supreme Court has recently interpreted the common-law rule of announcement codified in a state statute identical in relevant terms to § 3109 to apply to an entry by police through a closed but unlocked door. *People* v. *Rosales*, 68 Cal. 2d 299, 437 P. 2d 489 (1968). And it has been held that § 3109 applies to entries effected by the use of a passkey,[6] which requires no more force than does the turning of a doorknob. An unannounced intrusion into a dwelling—what § 3109 basically proscribes—is no less an unannounced intrusion whether officers break down a door, force open a chain lock on a partially open door, open a locked door by use of a passkey, or, as here, open a closed but unlocked door.[7] The protection afforded by, and the values inherent in, § 3109 must be "governed by something more than the fortuitous circumstance of an unlocked door." *Keiningham* v. *United States*, 109 U. S. App. D. C. 272, 276, 287 F. 2d 126, 130 (1960).

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viewed the development of that body of law as similar. See H. Voorhees, Law of Arrest §§ 159, 172–173 (1904); Wilgus, Arrest Without a Warrant, 22 Mich. L. Rev. 798, 806 (1924):

"What constitutes 'breaking' seems to be the same as in burglary: lifting a latch, turning a door knob, unhooking a chain or hasp, removing a prop to, or pushing open, a closed door of entrance to the house,—even a closed screen door . . . is a breaking . . . ." (Footnotes omitted.)

See generally Blakey, The Rule of Announcement and Unlawful Entry, 112 U. Pa. L. Rev. 499 (1964).

[6] See, *e. g.*, *Munoz* v. *United States*, 325 F. 2d 23, 26 (C. A. 9th Cir. 1963); *United States* v. *Sims*, 231 F. Supp. 251, 254 (D. C. Md. 1964); cf. *People* v. *Stephens*, 249 Cal. App. 2d 113, 57 Cal. Rptr. 66 (1967). See also *Ker* v. *California*, 374 U. S., at 38.

[7] We do not deal here with entries obtained by ruse, which have been viewed as involving no "breaking." See, *e. g.*, *Smith* v. *United States*, 357 F. 2d 486, 488 n. 1 (C. A. 5th Cir. 1966); *Leahy* v. *United States*, 272 F. 2d 487, 489 (C. A. 9th Cir. 1959). See also Wilgus, n. 5, *supra*, at 806.

The Government seeks to invoke an exception to the rule of announcement, contending that the agents' lack of compliance with the statute is excused because an announcement might have endangered the informant Jones or the officers themselves. See, *e. g.*, *Gilbert* v. *United States*, 366 F. 2d 923, 931 (C. A. 9th Cir. 1966), cert. denied, 388 U. S. 922 (1967); cf. *Ker* v. *California*, 374 U. S. 23, 39–40 (1963) (opinion of Clark, J.); *id.*, at 47 (opinion of BRENNAN, J.). However, whether or not "exigent circumstances," *Miller* v. *United States*, *supra*, at 309, would excuse compliance with § 3109,[8] this record does not reveal any substantial basis for excusing the failure of the agents here to announce their authority and purpose. The agents had no basis for assuming petitioner was armed or might resist arrest, or that Jones was in any danger. Nor, as to the former, did the agents make any independent investigation of petitioner prior to setting the stage for his arrest with the narcotics in his possession.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

MR. JUSTICE BLACK dissents.

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[8] Exceptions to any possible constitutional rule relating to announcement and entry have been recognized, see *Ker* v. *California*, *supra*, at 47 (opinion of BRENNAN, J.), and there is little reason why those limited exceptions might not also apply to § 3109, since they existed at common law, of which the statute is a codification. See generally Blakey, n. 5, *supra*.

WATTS ET AL. *v.* SEWARD SCHOOL BOARD ET AL.

CERTIORARI TO THE SUPREME COURT OF ALASKA.

No. 325. Argued March 26, 1968.—Decided June 3, 1968.

421 P. 2d 586, 423 P. 2d 678, vacated and remanded.

George Kaufmann argued the cause and filed briefs for petitioners.

Theodore M. Pease, Jr., argued the cause and filed a brief for respondents.

PER CURIAM.

The judgment is vacated and the case is remanded to the Supreme Court of Alaska for further consideration in light of *Pickering* v. *Board of Education of Township High School District 205, Will County, ante*, p. 563.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK joins, would reverse the judgment outright for the reasons stated by him in *Pickering* v. *Board of Education, ante*, p. 575.

MR. JUSTICE WHITE dissents.

KAISER STEEL CORP. *v.* W. S. RANCH CO.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 1328. Decided June 3, 1968.

The Court of Appeals erred in refusing to stay its action in this diversity case, as the crucial state law issue involved is of vital concern, is truly novel, will have to be resolved eventually in the New Mexico courts, and a declaratory judgment action is actually pending there.

Certiorari granted; 388 F. 2d 257 and 262, reversed and remanded.

J. R. Modrall for petitioner.

William R. Federici for respondent.

Boston E. Witt, Attorney General, and *F. Harlan Flint*, Special Assistant Attorney General, filed a brief for the State of New Mexico on the relation of the New Mexico State Engineer, as *amicus curiae*, in support of the petition.

PER CURIAM.

Respondent brought this diversity suit in the United States District Court for the District of New Mexico, claiming an illegal trespass by petitioner and seeking damages and an injunction. Petitioner admitted the alleged trespass but claimed it was authorized to do this by N. M. Stat. Ann. § 75–1–3 (1953), in order to use water rights it had been granted by the State. Respondent contended that if § 75–1–3 were construed to authorize condemnation of private land to secure water for a private business, the law would violate the New Mexico Constitution, which permits the taking of private property only for "public use." N. M. Const., Art. II, § 20. The crucial issue thus became the interpretation of the term "public use" in the State Constitution. The District Court held that the property had been taken for a

public use, rejecting the suggestion in petitioner's brief that the action be stayed pending decision of the crucial question by the state courts. The Court of Appeals reversed on the merits, 388 F. 2d 257 (1967), and rejected petitioner's motion to stay the federal court's action until the state law issues could be settled in a declaratory judgment suit then pending in the state courts, 388 F. 2d, at 262 (1968) (on petition for rehearing).

The Court of Appeals erred in refusing to stay its hand. The state law issue which is crucial in this case is one of vital concern in the arid State of New Mexico, where water is one of the most valuable natural resources. The issue, moreover, is a truly novel one. The question will eventually have to be resolved by the New Mexico courts, and since a declaratory judgment action is actually pending there, in all likelihood that resolution will be forthcoming soon. Sound judicial administration requires that the parties in this case be given the benefit of the same rule of law which will apply to all other businesses and landowners concerned with the use of this vital state resource.

The writ of certiorari is granted, the judgment of the Court of Appeals is reversed, and the case is remanded with directions that the action be stayed in accordance with the prayer of petitioner. Federal jurisdiction will be retained in the District Court in order to insure a just disposition of this litigation should anything prevent a prompt state court determination.

It is so ordered.

MR. JUSTICE BRENNAN, whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, concurring.

I concur solely on the ground that this case presents one of the "narrowly limited 'special circumstances' " which justify the invocation of "[t]he judge-made doctrine of abstention," *Zwickler* v. *Koota,* 389 U. S. 241, 248.

The "special circumstances," as the Court states, arise from the fact that "[t]he state law issue which is crucial in this case is one of vital concern in the arid State of New Mexico, where water is one of the most valuable natural resources." Cf. *Alabama Public Service Comm'n* v. *Southern R. Co.*, 341 U. S. 341; *Burford* v. *Sun Oil Co.*, 319 U. S. 315; see *Zwickler* v. *Koota, supra,* at 249, n. 11. I adhere however to my view, expressed in dissent in *Louisiana Power & Light Co.* v. *City of Thibodaux,* 360 U. S. 25, 31, that in a diversity case abstention from decision of a state law question is improper in the absence of such "special circumstances."

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JOHNSON *v.* FLORIDA.

APPEAL FROM THE SUPREME COURT OF FLORIDA.

No. 1393, Misc. Decided June 3, 1968.

Appellant, found by officers at 4:25 a. m. sitting on a bench at a bus stop, was charged with violating a Florida vagrancy law making it a misdemeanor to be found "wandering or strolling around from place to place without any lawful purpose or object." An officer testified concerning information which appellant had supplied, including the fact that he was on probation which had a 10 p. m. curfew and his whereabouts before arriving at the bus stop, where appellant said he had waited for a bus for some three hours. The record does not show how he got to the bus stop. Appellant's motion for a directed verdict was denied, the defense presented no evidence, appellant was convicted, and the Florida Supreme Court affirmed. *Held:* The fact that appellant was out long after the curfew hour of his probation may be held to establish the no "lawful purpose or object" ingredient of the offense, but the judgment cannot stand since there was no evidence establishing the "wandering or strolling" ingredient. *Thompson* v. *Louisville*, 362 U. S. 199.

202 So. 2d 852, reversed.

Earl Faircloth, Attorney General of Florida, and *Harold Mendelow*, Assistant Attorney General, for appellee.

PER CURIAM.

Appellant was charged with violating a Florida vagrancy statute, Fla. Stat. § 856.02, which makes it a misdemeanor to be found "wandering or strolling around from place to place without any lawful purpose or object."

Officer Havens testified that he and Officer Carani were patrolling the Bird Road area of Dade County at about 4:25 a. m. when they saw appellant seated on a bench at a bus stop. The officers stopped and asked him why

he was there. He replied that he was waiting for a bus. Havens told him that the last Bird Road bus had run at 11 p. m. and that buses did not resume service until 7 a. m. Havens then asked him where he had been. He said he had been to a theatre (which was about two miles away) and afterwards had gone to the house of his girl friend, Joyce, who lived near the theatre.

On Havens' request, appellant supplied identification which showed he was age 18 and lived in that area of the county.

Havens then asked him if he had ever been in trouble with the law. He replied that he was on probation from a breaking and entering charge and had a 10 p. m. curfew. He was then asked to account for his whereabouts from 11 p. m. to 4:30 a. m. He explained that he got out of the movie about 10:30 or 10:45, went to Joyce's house, and after leaving her place, and reaching the bus stop had waited some three hours for a bus. The officers did not discuss with appellant the means or manner by which he got to the bus stop from the theatre and Joyce's house; and the record does not supply that information. Appellant apparently had phoned for a cab after waiting on the bench two or three hours for a bus. Havens asked appellant how much money he had on his person. Appellant said he had 70¢ or 80¢. Havens told appellant this was not enough cabfare to get to appellant's residence. It was then that he was arrested.

The area where appellant was arrested is a mixed residential-business area with several stores, including a store, open 24 hours a day, directly across from where appellant sat on the bench. That store was well lighted. Where appellant sat was not lighted. Officer Carani added that there was a cab stand nearby (some 1,200 feet away) but that no cabs were seen in the area by him at the time appellant was interrogated.

Appellant, who waived a trial by jury, moved for directed verdict, arguing there was no proof that he wandered, no proof of absence of lawful purpose and no proof that a bus would not soon have come to the bus stop.

The motion was denied, the defense presented no evidence, appellant was convicted, and he was placed on probation for a year. The Florida Supreme Court affirmed. The case is here by appeal.*

The prosecution emphasized that appellant had failed to account for any "lawful purpose" during the time he sat on the bench for some three hours. The burden, however, is on the State to prove that an accused has committed an act bringing him within a criminal statute. The essential ingredients of the crime charged were "wandering or strolling around from place to place without any lawful purpose or object." The fact that he was on probation with a 10 p. m. curfew and out long after that hour may be held to establish that ingredient of the crime of no "lawful purpose or object." But he was not wandering, or strolling, only sitting. The bench where he sat was made for sitting and he was using it for that purpose in the precise place where the bench had been placed. And he had sat there for some hours. We therefore conclude that so far as the "wandering or strolling" ingredient of the crime is concerned, the record is lacking in any evidence to support the judgment. In line with *Thompson* v. *Louisville*, 362 U. S. 199, and without reach-

*The judgment of the Florida Supreme Court from which this appeal is taken was entered October 4, 1967. Appellant's notice of appeal, filed December 30, 1967, was timely under Rule 11 (1) of the Rules of this Court. The appeal was not docketed until 56 days after the time provided in Rule 13 (1) expired. This defect, however, is not jurisdictional. *Pittsburgh Towing Co.* v. *Mississippi Valley Barge Line Co.*, 385 U. S. 32.

ing other constitutional questions that are tendered, we must therefore grant the motion for leave to proceed *in forma pauperis* and reverse the judgment below.

Reversed.

MR. JUSTICE BLACK and MR. JUSTICE STEWART would dismiss the appeal.

MR. JUSTICE WHITE, with whom MR. JUSTICE HARLAN joins, dissenting.

Florida's courts have obviously interpreted their statute to permit a showing that a defendant was on a park bench at 4:25 a. m. "without any lawful purpose or object" to establish a prima facie case that the defendant was "wandering or strolling around" without lawful purpose. Most inhabitants of park benches reach their bench by wandering or strolling. So interpreting the statute, constitutionally sufficient amounts of evidence were presented.

The Court does not reach the claim appellant makes here, that Florida's statute offends the Constitution because it is vague. That claim is substantial, and I would note probable jurisdiction and set the case for oral argument.

IN RE FISCHER.

APPEAL FROM THE COURT OF APPEALS OF OHIO, CUYAHOGA COUNTY.

No. 229. Decided June 3, 1968.

Appeal dismissed and certiorari denied.

David I. Sindell for appellant.

John T. Corrigan and *Frederick W. Frey* for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

MR. JUSTICE DOUGLAS and MR. JUSTICE FORTAS are of the opinion that certiorari should be granted, the judgment vacated, and the case remanded for further consideration in light of *In re Gault*, 387 U. S. 1.

MR. JUSTICE BLACK dissents.

SKOLNICK ET AL. *v.* MOSES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 1330. Decided June 3, 1968.

Affirmed.

Peter S. Sarelas, appellant, *pro se*.

PER CURIAM.

The judgment is affirmed.

CLABER DISTRIBUTING CO. *v.* RUBBERMAID, INC.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 1310. Decided June 3, 1968.

Appeal dismissed.

Donald M. Robiner for appellant.

David W. Pancoast for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

FOSDICK ET AL. *v.* HAMILTON COUNTY.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 1352. Decided June 3, 1968.

13 Ohio St. 2d 63, 233 N. E. 2d 864, appeal dismissed and certiorari denied.

Robert H. Fosdick, pro se, and for other appellant.

Frank H. Shaffer, Jr., for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

JACKSON *v.* OLIVER, WARDEN.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 547, Misc. Decided June 3, 1968.

Certiorari granted; vacated and remanded.

Thomas C. Lynch, Attorney General of California, and *Edsel W. Haws* and *Edward A. Hinz, Jr.,* Deputy Attorneys General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Peyton* v. *Rowe, ante,* p. 54.

HEYMAN *v.* MICHIGAN.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 1099, Misc. Decided June 3, 1968.

Certiorari granted; vacated and remanded.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of *Peyton* v. *Rowe, ante,* p. 54.

VAUGHN *v.* RODRIGUEZ, ACTING WARDEN.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 1149, Misc. Decided June 3, 1968.

Certiorari granted; vacated and remanded.

Boston E. Witt, Attorney General of New Mexico, and *Thomas O. Olson,* Special Assistant Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Tenth Circuit for further consideration in light of *Peyton* v. *Rowe, ante,* p. 54.

PEART *v.* CALIFORNIA.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 1445, Misc. Decided June 3, 1968.

67 Cal. 2d 866, 434 P. 2d 609, appeal dismissed and certiorari denied.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

IOANNOU *v.* NEW YORK ET AL.

ON MOTION FOR LEAVE TO FILE A PETITION FOR REHEARING.

No. 191, October Term, 1962. Decided June 3, 1968.

371 U. S. 30, motion for leave to file petition for rehearing denied.

Sydney J. Schwartz on the motion.

Louis J. Lefkowitz, Attorney General of New York, and *Daniel M. Cohen,* Assistant Attorney General, in opposition.

PER CURIAM.

The motion for leave to file a petition for rehearing is denied upon the representation of the Attorney General of New York that the movant may file a new application "to withdraw the funds deposited with the New York City Treasurer" in the light of changed circumstances. See *Zschernig* v. *Miller,* 389 U. S. 429; *Goldstein* v. *Cox,* 389 U. S. 581.

MR. JUSTICE DOUGLAS.

Since the only changed circumstances concern the intervening decision of this Court in *Zschernig* v. *Miller,* 389 U. S. 429, and since the rationale of that decision applies to custodial statutes such as New York has as well as to escheat statutes like Oregon's, I would dispose of the case here and now (either after or without oral argument) and not require petitioner to retravel once more the long, arduous, and expensive path from New York's surrogate court.

MR. JUSTICE HARLAN would deny unconditionally the motion for leave to file a petition for rehearing, substantially for the reasons given in his dissenting opinion in *United States* v. *Ohio Power Co.,* 353 U. S. 98, 99.

MR. JUSTICE FORTAS and MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

BONNIE *v.* GLADDEN, WARDEN.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 731, Misc. Decided June 3, 1968.

Certiorari granted; 377 F. 2d 555, vacated and remanded.

Howard R. Lonergan for petitioner.

Robert Y. Thornton, Attorney General of Oregon, and *David H. Blunt,* Assistant Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Carafas* v. *LaVallee, ante,* p. 234.

REPORTER'S NOTE.

The next page is purposely numbered 901. The numbers between 605 and 901 were intentionally omitted, in order to make it possible to publish the orders in the current advance sheets or preliminary prints of the United States Reports with *permanent* page numbers, thus making the official citations immediately available.

ORDERS FROM MAY 6 THROUGH JUNE 7, 1968.

MAY 6, 1968.

Miscellaneous Orders.

No. 29, Orig. TEXAS ET AL. *v.* COLORADO. Motion of the United States for leave to intervene as plaintiff granted. Joint motion of Texas, New Mexico, and Colorado for continuance granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of these motions. *Solicitor General Griswold* on the motion for the United States. *Crawford C. Martin,* Attorney General, for the State of Texas, *Boston E. Witt,* Attorney General, for the State of New Mexico, and *Duke W. Dunbar,* Attorney General, for the State of Colorado, on the joint motion. [For earlier orders herein, see, *e. g.,* 390 U. S. 933.]

No. 1281. KAUFMAN *v.* UNITED STATES. C. A. 8th Cir. (Certiorari granted, 390 U. S. 1002.) Motion of petitioner for appointment of counsel granted. It is ordered that *Bruce R. Jacob, Esquire,* of Atlanta, Georgia, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for petitioner in this case. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

No. 1424, Misc. HARRIS *v.* KROPP, WARDEN;

No. 1432, Misc. GRAVES *v.* WAINWRIGHT, CORRECTIONS DIRECTOR;

No. 1467, Misc. HAMPSON *v.* ROBB, CLERK, U. S. DISTRICT COURT, ET AL.; and

No. 1504, Misc. RONAN *v.* STONE ET AL. Motions for leave to file petitions for writs of habeas corpus denied.

No. 1257. FOSTER *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. (Certiorari granted, 390 U. S. 994.) Motion of petitioner for appointment of counsel granted. It is ordered that *Kenneth L. Maddy, Esquire,* of Fresno, California, be, and he is hereby, appointed to serve as counsel for petitioner in this case.

No. 325. WATTS ET AL. *v.* SEWARD SCHOOL BOARD ET AL. Sup. Ct. Alaska. (Certiorari granted, 389 U. S. 818.) Motion of petitioners for leave to file supplemental memorandum, after argument, granted. *George Kaufmann* on the motion.

No. 718, Misc., October Term, 1965. WILLIAMSON ET AL. *v.* BLANKENSHIP, JUDGE, ET AL., 382 U. S. 923. Motion to recall and amend order denying certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

Certiorari Granted. (See also No. 42, *ante,* p. 53; and No. 44, *ante,* p. 53.)

No. 1172. GRUNENTHAL *v.* LONG ISLAND RAIL ROAD CO. ET AL. C. A. 2d Cir. Certiorari granted. *Milford J. Meyer* and *Irving Younger* for petitioner. *Hugh B. Cox* and *Paul F. McArdle* for respondent Long Island Rail Road Co. Reported below: 388 F. 2d 480.

No. 176, Misc. GARDNER *v.* CALIFORNIA. Super. Ct. Cal., County of San Luis Obispo. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted and case transferred to appellate docket. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Jack K. Weber,* Deputy Attorney General, for respondent.

No. 772, Misc. STILES *v.* UNITED STATES. C. A. 1st Cir. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted and case transferred to appellate docket. *Solicitor General Griswold* for the United States.

Certiorari Denied.

No. 1227. STRAUSS *v.* GRIMES, SHERIFF. Sup. Ct. Ga. Certiorari denied. *Arthur B. Cunningham, Philip T. Weinstein,* and *Harold Karp* for petitioner. *J. Walter LeCraw, J. Robert Sparks,* and *Lewis R. Slaton* for respondent. Reported below: 223 Ga. 834, 158 S. E. 2d 404.

No. 1228. THOMPSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *William Klein* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Mervyn Hamburg* for the United States. Reported below: 389 F. 2d 37.

No. 1233. BURKE *v.* CARPENTER ET AL. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold* for the United States in opposition. Reported below: 387 F. 2d 259.

No. 1237. BENSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *G. Edward Friar* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Robert G. Maysack* for the United States. Reported below: 389 F. 2d 376.

No. 1244. WILSON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. *George R. Maury* for petitioner. Reported below: 256 Cal. App. 2d 411, 64 Cal. Rptr. 172.

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No. 1236. DELONEY ET UX. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Charles B. Evins, R. Eugene Pincham,* and *Earl E. Strayhorn* for petitioners. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Edward Fenig* for the United States. Reported below: 389 F. 2d 324.

No. 1239. CITIZENS BANK OF HATTIESBURG ET AL. *v.* CAMP, COMPTROLLER OF THE CURRENCY. C. A. 5th Cir. Certiorari denied. *M. M. Roberts* for petitioners. *Solicitor General Griswold* for respondent. Reported below: 387 F. 2d 375.

No. 1243. LOCAL 138, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL–CIO *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. *William J. Corcoran* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli, Norton J. Come,* and *Leonard M. Wagman* for respondent. Reported below: 385 F. 2d 874.

No. 1247. 931 EAST BOULEVARD CO. *v.* CITY OF CLEVELAND ET AL. Sup. Ct. Ohio. Certiorari denied. *Bernard A. Berkman, Larry S. Gordon, Joshua J. Kancelbaum,* and *Gerald A. Messerman* for petitioner. *David A. Nelson* for respondents White Motor Corp. et al., and *Edward D. Crocker* for respondent Eaton Manufacturing Co.

No. 1254. ROANOKE IRON & BRIDGE WORKS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. D. C. Cir. Certiorari denied. *R. D. Douglas, Jr.,* and *Bartholomew Diggins* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli,* and *Norton J. Come* for respondent. Reported below: —— U. S. App. D. C. ——, 390 F. 2d 846.

No. 1248. HESMER FOODS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. *Harry P. Dees* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli,* and *Norton J. Come* for respondent.

No. 1251. SWAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Julian Herndon, Jr.,* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States.

No. 1256. KOEHRING CO. *v.* HYDE CONSTRUCTION CO., INC. C. A. 10th Cir. Certiorari denied. *Steven E. Keane, Maurice J. McSweeney,* and *William A. Denny* for petitioner. *Jack N. Hays* and *Charles Clark* for respondent. Reported below: 388 F. 2d 501.

No. 1258. CONTINENTAL MARKETING CORP. *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 10th Cir. Certiorari denied. *Lewis B. Kean* and *H. Byron Mock* for petitioner. *Solicitor General Griswold, Philip A. Loomis, Jr.,* and *David Ferber* for respondent. Reported below: 387 F. 2d 466.

No. 1260. WYETH-SCOTT CO. *v.* SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES ET AL. (DRIGGERS ET AL., real parties in interest). Ct. App. Cal., 2d App. Dist. Certiorari denied. *Francis L. Young, Jr.,* and *Thomas S. Jackson* for petitioner. *Hillel Chodos* for respondent Driggers, and *William E. Burby, Jr.,* for respondent B & B Supply Co.

No. 1114. ARKEY *v.* OHIO. Sup. Ct. Ohio. Motion to dispense with printing petition granted. Certiorari denied. *Frank Spiegel* for petitioner. *John T. Corrigan* for respondent.

No. 1265. FROMBACH *v.* GILBERT ASSOCIATES, INC. Sup. Ct. Del. Certiorari denied. *Abraham E. Freedman, Milton M. Borowsky,* and *Martin J. Vigderman* for petitioner. *Frederick Bernays Wiener* for respondent. Reported below: — Del. —, 236 A. 2d 363.

No. 1288. AMERICAN OIL CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. *Karl H. Mueller* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli,* and *Norton J. Come* for respondent. Reported below: 387 F. 2d 786.

No. 1235. STURMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. *David Ralph Hertz* and *Eugene Gressman* for petitioner. *Solicitor General Griswold* for the United States.

No. 914, Misc. ALLISON *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. *Richard C. Turner,* Attorney General of Iowa, and *James C. Sell,* Assistant Attorney General, for respondent. Reported below: 260 Iowa 176, 147 N. W. 2d 910.

No. 1009, Misc. CONWAY *v.* PROCUNIER, CORRECTIONS DIRECTOR. Sup. Ct. Cal. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, and *Edsel W. Haws* and *Edward A. Hinz, Jr.,* Deputy Attorneys General, for respondent.

No. 1025, Misc. BRYANS *v.* BLACKWELL, WARDEN. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold* for respondent.

No. 1329, Misc. JONES *v.* PROCUNIER, CORRECTIONS DIRECTOR, ET AL. Sup. Ct. Cal. Certiorari denied.

No. 1124, Misc. BRYANS *v.* BLACKWELL, WARDEN. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold* for respondent. Reported below: 387 F. 2d 764.

No. 1166, Misc. TALMANSON *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Mervyn Hamburg* for the United States. Reported below: 386 F. 2d 811.

No. 1237, Misc. LERMA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Robert G. Maysack* for the United States. Reported below: 387 F. 2d 187.

No. 1333, Misc. STURGIS *v.* WARDEN, MARYLAND PENITENTIARY. C. A. 4th Cir. Certiorari denied.

No. 1334, Misc. LEE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Edward Fenig* for the United States.

No. 1338, Misc. STOVALL *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied.

No. 1339, Misc. REED *v.* PATE, WARDEN. Sup. Ct. Ill. Certiorari denied.

No. 1342, Misc. WOOD *v.* CONNEAUT LAKE PARK, INC. C. A. 3d Cir. Certiorari denied. *Sidney J. Sable* for petitioner. *William C. Walker* for respondent. Reported below: 386 F. 2d 121.

No. 1348, Misc. HILL *v.* CRAVEN, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 1349, Misc. CARTER ET AL. *v.* HIGHWAY INSURANCE UNDERWRITERS ET AL. Sup. Ct. La. Certiorari denied.

No. 1352, Misc. PICHE *v.* RHAY, PENITENTIARY SUPERINTENDENT. Sup. Ct. Wash. Certiorari denied.

No. 1355, Misc. HAINES *v.* FRYE, WARDEN. Cir. Ct., Cook County, Ill. Certiorari denied.

No. 1357, Misc. STEELE *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 254 Cal. App. 2d 758, 62 Cal. Rptr. 452.

No. 1362, Misc. PATTON *v.* VETERANS ADMINISTRATION ET AL. C. A. 4th Cir. Certiorari denied. *Solicitor General Griswold* for respondents.

No. 1365, Misc. DEBARTOLO *v.* NELSON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 1390, Misc. PRICE *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. *Robert Friebert* for petitioner. Reported below: 37 Wis. 2d 117, 154 N. W. 2d 222.

No. 1391, Misc. AGNELLO *v.* WOODS, SHERIFF, ET AL. C. A. 7th Cir. Certiorari denied.

No. 1395, Misc. HARRIS *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 387 F. 2d 149.

No. 1477, Misc. TURNER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

Rehearing Denied.

No. 38. PROTECTIVE COMMITTEE FOR INDEPENDENT STOCKHOLDERS OF TMT TRAILER FERRY, INC. *v.* ANDERSON, TRUSTEE IN BANKRUPTCY, ET AL., 390 U. S. 414; and

No. 528. BERGUIDO ET AL. *v.* EASTERN AIRLINES, INC., 390 U. S. 996. Petitions for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of these petitions.

No. 1018. MASTERSON *v.* UNITED STATES, 390 U. S. 954. Motion for leave to file petition for rehearing denied.

No. 709, Misc. SAAL *v.* UNITED STATES, 390 U. S. 1015. Petition for rehearing denied.

MAY 10, 1968.

Dismissal Under Rule 60.

No. 1732, Misc. MCCAMMON *v.* UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT. Motion for leave to file petition for writ of mandamus dismissed pursuant to Rule 60 of the Rules of this Court.

MAY 14, 1968.

Dismissal Under Rule 60.

No. 1779, Misc. BRYANT *v.* MARYLAND. Baltimore City Ct. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court.

MAY 20, 1968.

Miscellaneous Orders.

No. —. WINTERS *v.* UNITED STATES ET AL., 390 U. S. 993. Application for reconsideration of application for temporary stay, presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. MR. JUSTICE DOUGLAS dissents. *Moses M. Falk* for applicant. *Solicitor General Griswold* for the United States et al. in opposition.

No. 9, Orig. UNITED STATES *v.* LOUISIANA ET AL. Motions of the State of Louisiana and the United States for entry of Supplemental Decree No. 2 are set down for oral argument during week of October 14, 1968. Main briefs of counsel shall be filed on or before August 15, 1968, and reply briefs on or before September 16, 1968. THE CHIEF JUSTICE and MR. JUSTICE MARSHALL took no part in the consideration or decision of this order. On the motion for the State of Louisiana were *Jack P. F. Gremillion*, Attorney General, *Victor A. Sachse, Paul M. Hebert, Thomas W. Leigh, Robert F. Kennon, W. Scott Wilkinson, J. B. Miller, Oliver P. Stockwell, J. J. Davidson*, and *Frederick W. Ellis*, Special Assistant Attorneys General, and *John L. Madden*, Assistant Attorney General. On the motion for the United States were *Solicitor General Griswold, Assistant Attorney General Martz, Archibald Cox*, Special Assistant to the Attorney General, *Louis F. Claiborne, Roger P. Marquis*, and *George S. Swarth*. [See 389 U. S. 155.]

No. 937. COMMONWEALTH COATINGS CORP. *v.* CONTINENTAL CASUALTY CO. ET AL. C. A. 1st Cir. (Certiorari granted, 390 U. S. 979.) Motion of respondents to remove case from summary calendar denied. *Luther P. House, Jr.*, on the motion.

No. 23. First National Bank of Arizona, Executor *v.* Cities Service Co., *ante*, p. 253. Motion to substitute the First National Bank of Arizona in place of Patricia Waldron as the petitioner granted. *William E. Kelly, David Orlin, Preben Jensen,* and *Alan R. Wentzel* on the motion.

No. 1280. Makah Indian Tribe *v.* Tax Commission of Washington et al. Appeal from Sup. Ct. Wash. The Solicitor General is invited to file a brief expressing the views of the United States.

No. 1399. Gardner *v.* California. Super. Ct. Cal., County of San Luis Obispo. (Certiorari granted, *ante*, p. 902.) Motion of petitioner for appointment of counsel granted. It is ordered that *Charles E. Rickershauser, Jr., Esquire,* of Los Angeles, California, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for petitioner in this case.

No. 1902, Misc. In re Disbarment of Rothbard. It is ordered that Sol Rothbard, of Washington, District of Columbia, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 1589, Misc. Duckett *v.* Field, Mens Colony Superintendent; and

No. 1639, Misc. Smith *v.* Reincke, Warden. Motions for leave to file petitions for writs of habeas corpus denied.

No. 1726, Misc. Hooper et al. *v.* Gooding, Judge. Motion for leave to file petition for writ of mandamus denied. *John P. Frank* and *John J. Flynn* for petitioner Hooper.

Certiorari Granted. (See also No. 227, *ante*, p. 363; No. 415, *ante*, p. 363; No. 373, *ante*, p. 365; No. 380, *ante*, p. 365; No. 385, *ante*, p. 365; No. 503, *ante*, p. 366; and No. 794, Misc., *ante*, p. 346.)

No. 1303. LEAR, INC. *v.* ADKINS. Sup. Ct. Cal. Certiorari granted. *C. Russell Hale*, *Edwin L. Hartz*, *Thomas G. Corcoran*, and *Allen E. Throop* for petitioner. *Allen E. Susman* for respondent. Reported below: 67 Cal. 2d 882, 435 P. 2d 321.

No. 1246. OESTEREICH *v.* SELECTIVE SERVICE SYSTEM LOCAL BOARD NO. 11, CHEYENNE, WYOMING, ET AL. C. A. 10th Cir. Certiorari granted. *Melvin L. Wulf*, *Alan H. Levine*, and *Marvin M. Karpatkin* for petitioner. *Solicitor General Griswold* for respondents. Reported below: 390 F. 2d 100.

Certiorari Denied. (See also No. 1217, Misc., *ante*, p. 360; No. 1392, Misc., *ante*, p. 362; No. 1446, Misc., *ante*, p. 361; and No. 1536, Misc., *ante*, p. 362.)

No. 1142. UNDERHILL *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. *Howard T. Savage* for petitioner. *William G. Clark*, Attorney General of Illinois, and *John J. O'Toole*, Assistant Attorney General, for respondent. Reported below: 38 Ill. 2d 245, 230 N. E. 2d 837.

No. 1272. FRUGE *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. *Sam J. D'Amico* and *Robert L. Kleinpeter* for petitioner. Reported below: 251 La. 283, 204 So. 2d 287.

No. 1242. BROMBERG ET AL. *v.* HOLIDAY INNS OF AMERICA ET AL. C. A. 7th Cir. Certiorari denied. *Morris S. Bromberg*, *Alex Elson*, *Willard J. Lassers*, and *Aaron S. Wolfe* for petitioners. *Miles G. Seeley* for respondents. Reported below: 388 F. 2d 639.

No. 1275. BUTTERMAN ET UX. *v.* WALSTON & Co., INC., ET AL. C. A. 7th Cir. Certiorari denied. *Robert S. O'Shea* for petitioners. Reported below: 387 F. 2d 822.

No. 1230. SOUTHERN PACIFIC CO. *v.* BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN. C. A. D. C. Cir. Certiorari denied. *Francis M. Shea, Richard T. Conway, Ralph J. Moore, Jr., James R. Wolfe,* and *Tom Martin Davis* for petitioner. *Milton Kramer, Harold C. Heiss,* and *Russell B. Day* for respondent. Reported below: —— U. S. App. D. C. ——, 393 F. 2d 345.

No. 1264. INTERNATIONAL LONGSHOREMEN'S ASSN. ET AL. *v.* PHILADELPHIA MARINE TRADE ASSN. C. A. 3d Cir. Certiorari denied. *Abraham E. Freedman* and *Martin J. Vigderman* for petitioners. *Francis A. Scanlan* for respondent. Reported below: 387 F. 2d 431.

No. 1271. GILSTRAP ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Robert B. Thompson* for petitioners. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States. Reported below: 389 F. 2d 6.

No. 1278. PRUITT ET UX. *v.* HELENE CURTIS INDUSTRIES, INC., ET AL. C. A. 5th Cir. Certiorari denied. *Eugene Gressman* for petitioners. *Elmer H. Parish* for respondent Cosmair, Inc. Reported below: 385 F. 2d 841.

No. 1289. COCHRAN ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Robert B. Thompson* for petitioners. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Mervyn Hamburg* for the United States. Reported below: 389 F. 2d 326.

No. 1279. AUTOMATIC RADIO MFG. CO., INC., ET AL. *v.* FORD MOTOR CO. C. A. 1st Cir. Certiorari denied. *Worth Rowley* and *Roger P. Stokey* for petitioners. *Claude R. Branch* for respondent. Reported below: 390 F. 2d 113.

No. 1282. BURDEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Virgil V. Becker* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Philip R. Monahan* for the United States. Reported below: 389 F. 2d 768.

No. 1287. ESSO STANDARD OIL S. A. *v.* THE GASBRAS SUL ET AL. C. A. 2d Cir. Certiorari denied. *Walter P. Hickey* and *Charles N. Fiddler* for petitioner. *Gordon W. Paulsen* for respondents. Reported below: 387 F. 2d 573.

No. 1292. BUILDING & CONSTRUCTION TRADES COUNCIL OF NEW ORLEANS, AFL–CIO *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 5th Cir. Certiorari denied. *Louis Sherman* and *Laurence J. Cohen* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli,* and *Norton J. Come* for respondent National Labor Relations Board. *Winthrop A. Johns* for International Union of District 50, United Mine Workers of America, as *amicus curiae,* in opposition. Reported below: 387 F. 2d 79.

No. 1293. CHERRY ET AL. *v.* POSTMASTER GENERAL ET AL. C. A. 1st Cir. Certiorari denied. *Solicitor General Griswold* for respondents.

No. 1294. D/S A/S SVERRE *v.* TEXPORTS STEVEDORE CO., INC. C. A. 5th Cir. Certiorari denied. *Edward W. Watson* for petitioner. *E. D. Vickery* for respondent. Reported below: 387 F. 2d 648.

No. 1298. CIELEN *v.* AETNA LIFE INSURANCE CO. ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. *Peter S. Sarelas* for petitioner. *Thomas J. Johnson, Jr.*, for Aetna Life Insurance Co., and *John M. O'Connor, Jr.*, and *Lawrence Gunnels* for Travelers Insurance Co., respondents. Reported below: 86 Ill. App. 2d 22, 229 N. E. 2d 571.

No. 1300. STEARNS *v.* TABOR ET AL. C. A. 3d Cir. Certiorari denied. *Murray C. Goldman* for petitioner. *Gordon W. Gerber* and *Read Rocap, Jr.*, for respondents. Reported below: 389 F. 2d 645.

No. 1304. HANDSFORD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Andrew Jackson Whitehurst III* and *Edwin A. Carlisle* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Mervyn Hamburg* for the United States. Reported below: 390 F. 2d 373.

No. 1308. LAMONT *v.* COMMISSIONER OF MOTOR VEHICLES ET AL. C. A. 2d Cir. Certiorari denied. *Leonard B. Boudin* and *Victor Rabinowitz* for petitioner. *Louis J. Lefkowitz,* Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Joel Lewittes* and *Mortimer Sattler,* Assistant Attorneys General, for Commissioner of Motor Vehicles, and *Wyllys S. Newcomb* for R. L. Polk & Co., respondents. Reported below: 386 F. 2d 449.

No. 1335. HOOPER ET AL. *v.* GOODING, JUDGE, ET AL. Sup. Ct. Ariz. Certiorari denied. *John P. Frank* and *John J. Flynn* for petitioner Hooper. *Darrell F. Smith,* Attorney General of Arizona, *Norval C. Jesperson,* Assistant Attorney General, and *Mark Wilmer,* Special Assistant Attorney General, for respondents.

No. 1322. KAMERMAN & KAMERMAN *v.* SELIGSON, TRUSTEE IN BANKRUPTCY. C. A. 2d Cir. Certiorari denied. *Murray H. Paloger* for petitioner. *Charles Seligson,* respondent, *pro se.* Reported below: 390 F. 2d 251.

No. 1306. SCANLAN *v.* ANHEUSER-BUSCH, INC., ET AL. C. A. 9th Cir. Certiorari denied. *J. Albert Hutchinson* for petitioner. *Charles E. Hanger* for respondents. Reported below: 388 F. 2d 918.

No. 82. TEXACO INC. ET AL. *v.* FEDERAL POWER COMMISSION ET AL. C. A. 10th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *William K. Tell, William R. Slye,* and *James D. Annett* for Texaco Inc., *Homer E. McEwen, Jr.,* for Sunray DX Oil Co., *Martin N. Erck* for Humble Oil & Refining Co., *Vernon W. Woods* for Union Producing Co., *Kiel Boone* for Cox, *Richard F. Remmers* for Sohio Petroleum Co., *Warren M. Sparks* for Gulf Oil Corp., and *Robert W. Henderson* and *Thomas G. Crouch* for Hunt, petitioners. *Solicitor General Marshall* and *Richard A. Solomon* for respondent Federal Power Commission, *Edwin F. Russell, Harry G. Hill, Jr.,* and *Barbara M. Suchow* for respondent Brooklyn Union Gas Co., *Samuel Graff Miller* for respondent Philadelphia Electric Co., *Bertram D. Moll* and *Morton L. Simons* for respondent Long Island Lighting Co., and *Kent H. Brown* for respondent Public Service Commission of the State of New York. Reported below: 370 F. 2d 181.

No. 1296. MOODY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Lucius E. Burch, Jr.,* for petitioner. *Solicitor General Griswold, Assistant Attorney General Rogovin,* and *Joseph M. Howard* for the United States.

No. 1334. HOOPER ET AL. *v.* GOODING, JUDGE, ET AL. C. A. 9th Cir. Certiorari denied. *John P. Frank* and *John J. Flynn* for petitioner Hooper. *Darrell F. Smith*, Attorney General of Arizona, *Norval C. Jesperson*, Assistant Attorney General, and *Mark Wilmer*, Special Assistant Attorney General, for respondent Gooding. Reported below: 394 F. 2d 146.

No. 504. AUSTRAL OIL CO. INC. *v.* FEDERAL POWER COMMISSION. C. A. 5th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *J. Evans Attwell* and *W. H. Drushel, Jr.*, for petitioner. *Acting Solicitor General Spritzer, Richard A. Solomon, Peter H. Schiff*, and *Joel Yohalem* for respondent. Reported below: 378 F. 2d 510.

No. 516. SUPERIOR OIL CO. ET AL. *v.* FEDERAL POWER COMMISSION ET AL. C. A. 10th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Murray Christian* and *H. W. Varner* for Superior Oil Co., and *H. H. Hillyer, Jr.*, for J. Ray McDermott & Co., Inc., petitioners. *Acting Solicitor General Spritzer, Richard A. Solomon, Peter H. Schiff*, and *Joel Yohalem* for respondent Federal Power Commission. Reported below: 376 F. 2d 161.

No. 1348. FOLLETTE, WARDEN *v.* MOLLOY. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. MR. JUSTICE BLACK is of the opinion that certiorari should be granted. *Louis J. Lefkowitz*, Attorney General of New York, *Samuel A. Hirshowitz*, First Assistant Attorney General, and *Brenda Soloff*, Assistant Attorney General, for petitioner. *C. Dickerman Williams* for respondent. Reported below: 391 F. 2d 231.

No. 520. BROOKLYN UNION GAS CO. ET AL. *v.* FEDERAL POWER COMMISSION ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Edwin F. Russell* and *Barbara M. Suchow* for Brooklyn Union Gas Co., *Bertram D. Moll* and *Morton L. Simons* for Long Island Lighting Co., *Kent H. Brown* for Public Service Commission of the State of New York, and *William T. Coleman, Jr.*, and *Robert W. Maris* for Philadelphia Gas Works Division of United Gas Improvement Co., petitioners. *Acting Solicitor General Spritzer, Richard A. Solomon, Peter H. Schiff*, and *Joel Yohalem* for respondent Federal Power Commission, *Phillip D. Endom, Robert E. May*, and *Francis H. Caskin* for respondent Sun Oil Co., *Martin N. Erck, Sherman S. Poland*, and *James D. McKinney* for respondent Humble Oil & Refining Co., *J. P. Hammond, Harold H. Young, Jr., William J. Grove, Carroll L. Gilliam*, and *Philip R. Ehrenkranz* for respondent Pan American Petroleum Corp., *Warren M. Sparks* and *Donald R. Arnett* for respondent Gulf Oil Corp., *J. Evans Attwell* for respondent Austral Oil Co., Inc., and *William K. Tell, Jr., William R. Slye*, and *James D. Annett* for respondent Texaco Inc. Reported below: 378 F. 2d 510.

No. 628. TEXACO INC. ET AL. *v.* FEDERAL POWER COMMISSION ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *William K. Tell, Jr., William R. Slye*, and *James D. Annett* for Texaco Inc., *J. P. Hammond, Harold H. Young, Jr., William J. Grove, Carroll L. Gilliam*, and *Philip R. Ehrenkranz* for Pan American Petroleum Corp., and *Warren M. Sparks* and *Donald R. Arnett* for Gulf Oil Corp., petitioners. *Acting Solicitor General Spritzer* and *Richard A. Solomon* for respondent Federal Power Commission. Reported below: 378 F. 2d 510.

No. 526. BLANCO OIL CO. ET AL. *v.* FEDERAL POWER COMMISSION. C. A. 5th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *George B. Mickum III* for petitioners. *Acting Solicitor General Spritzer, Richard A. Solomon, Peter H. Schiff,* and *Joel Yohalem* for respondent. Reported below: 378 F. 2d 510.

No. 1259. DENVER & RIO GRANDE WESTERN RAILROAD CO. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Dennis McCarthy* for petitioner. *Solicitor General Griswold, Assistant Attorney General Weisl, Alan S. Rosenthal,* and *Norman Knopf* for the United States. *William M. Moloney* and *Carl V. Lyon* for Association of American Railroads, as *amicus curiae,* in support of the petition. Reported below: 385 F. 2d 161.

No. 1285. MARTIN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Edward Bennett Williams* and *Robert L. Weinberg* for Martin, and *Morris A. Shenker* for Dodson, petitioners. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States. Reported below: 389 F. 2d 895.

No. 1250. GENERAL FOODS CORP. *v.* FEDERAL TRADE COMMISSION. C. A. 3d Cir. Certiorari denied. MR. JUSTICE HARLAN is of the opinion that certiorari should be granted and the case set down for oral argument. *Roberts B. Owen* for petitioner. *Solicitor General Griswold, Assistant Attorney General Turner, Lawrence G. Wallace, James McI. Henderson,* and *Thomas F. Howder* for respondent. Reported below: 386 F. 2d 936.

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No. 1130. PHELAN *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Abraham J. Brem Levy* and *John A. Papola* for petitioner. *Arlen Specter* for respondent. Reported below: 427 Pa. 265, 234 A. 2d 540.

No. 1284. NESSON *v.* UNITED STATES. C. A. 1st Cir. Motion to dispense with printing petition granted. Certiorari denied. *Eugene X. Giroux* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States. Reported below: 388 F. 2d 603.

No. 1268. KOCHER *v.* FOWLER, SECRETARY OF THE TREASURY, ET AL. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE FORTAS took no part in the consideration or decision of this petition. *Harold J. Nussbaum, Milton M. Jacobs,* and *Robert E. Goostree* for petitioner. *Solicitor General Griswold, Assistant Attorney General Weisl,* and *Alan S. Rosenthal* for respondents. Reported below: — U. S. App. D. C. —, 397 F. 2d 641.

No. 1245. IN RE WHITESIDE. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Loring J. Whiteside,* petitioner, *pro se. Solicitor General Griswold* filed a memorandum in opposition. Reported below: 386 F. 2d 805.

No. 1027, Misc. SPURLIN *v.* DUTTON, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. *Arthur K. Bolton,* Attorney General of Georgia, *G. Ernest Tidwell,* Executive Assistant Attorney General, *Marion O. Gordon,* Assistant Attorney General, and *William R. Childers, Jr.,* Deputy Assistant Attorney General, for respondent Dutton.

No. 1331. BROWN ET AL., TRUSTEES *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. Motion of Girard College Alumni for leave to file a brief, as *amicus curiae*, granted. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion and petition. *Arthur Littleton, John Russell, Jr., Ernest R. von Starck,* and *Richard P. Brown, Jr.*, for petitioners. *Levy Anderson* for City of Philadelphia, and *Charles J. Biddle, William T. Coleman,* and *Robert W. Maris* for Pennsylvania et al., respondents. *Philip Price* for Girard College Alumni, as *amicus curiae*, in support of the petition. Reported below: 392 F. 2d 120.

No. 899, Misc. RASMUSSEN *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *Albert W. Harris, Jr.,* Assistant Attorney General, and *Horace Wheatley,* Deputy Attorney General, for respondent.

No. 926, Misc. FLETCHER *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. *William E. Gray* for petitioner. *Crawford C. Martin,* Attorney General of Texas, and *Howard M. Fender,* Assistant Attorney General, for respondent.

No. 948, Misc. GONZALES *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Robert H. Francis,* Deputy Attorney General, for respondent.

No. 999, Misc. BRAM *v.* HEROLD, STATE HOSPITAL DIRECTOR. C. A. 2d Cir. Certiorari denied. *Louis J. Lefkowitz,* Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *John G. Proudfit,* Assistant Attorney General, for respondent.

No. 1000, Misc. SPURRIER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Richard L. Brown* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States. Reported below: 389 F. 2d 367.

No. 1073, Misc. MCFADDEN *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *Albert W. Harris, Jr.,* Assistant Attorney General, and *Robert R. Granucci* and *Jerome C. Utz,* Deputy Attorneys General, for respondent.

No. 1100, Misc. QUARLES ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Mervyn Hamburg* for the United States. Reported below: 387 F. 2d 551.

No. 1239, Misc. BICKHAM *v.* MCSWEENY ET AL. Cir. Ct., Will County, Ill. Certiorari denied.

No. 1259, Misc. JOHNSON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Edward Fenig* for the United States.

No. 1297, Misc. RYAN *v.* LOUISIANA. Sup. Ct. La. Certiorari denied.

No. 1305, Misc. DAVIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Mervyn Hamburg* for the United States. Reported below: 386 F. 2d 837.

No. 1294, Misc. RABIOLO *v.* WEINSTEIN ET AL. C. A. 7th Cir. Certiorari denied. *Eugene T. Devitt* for petitioner. *Solicitor General Griswold* for respondents.

No. 1313, Misc. DAUGHERTY *v.* HOCKER, WARDEN. Sup. Ct. Nev. Certiorari denied.

No. 1314, Misc. WILKINS *v.* HEROLD, STATE HOSPITAL DIRECTOR. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied.

No. 1319, Misc. HINMAN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 253 Cal. App. 2d 896, 61 Cal. Rptr. 609.

No. 1326, Misc. SCHACK *v.* MCRAE, U. S. DISTRICT JUDGE. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Kirby W. Patterson* for respondent.

No. 1328, Misc. SHUFORD *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied.

No. 1343, Misc. COUSINS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Robert G. Maysack* for the United States.

No. 1361, Misc. MATHIS *v.* VIRGINIA. Sup. Ct. App. Va. Certiorari denied.

No. 1375, Misc. NORMAN *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 252 Cal. App. 2d 381, 60 Cal. Rptr. 609.

No. 1372, Misc. UPCHURCH *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Charles T. Akre* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States.

No. 1377, Misc. THOMPSON *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 1379, Misc. KRESTEFF *v.* KRESTEFF. Sup. Ct. Ill. Certiorari denied. *Gordon Burroughs* for respondent.

No. 1384, Misc. WOOLSEY *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. *William E. Gray* for petitioner. Reported below: 387 F. 2d 138.

No. 1385, Misc. OPHEIM *v.* CAMPBELL, SHERIFF. C. A. 10th Cir. Certiorari denied.

No. 1386, Misc. ALLEN *v.* BERRY, SHERIFF. Sup. Ct. Wash. Certiorari denied.

No. 1400, Misc. O'BRIEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 1402, Misc. ORR *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. *Marshall Patner* for petitioner. Reported below: 38 Ill. 2d 417, 231 N. E. 2d 424.

No. 1412, Misc. SINCLAIR *v.* TURNER, WARDEN. Sup. Ct. Utah. Certiorari denied. *Jimi Mitsunaga* for petitioner. Reported below: 20 Utah 2d 126, 434 P. 2d 305.

No. 1413, Misc. HARE *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 278 Minn. 405, 154 N. W. 2d 820.

No. 1387, Misc. MILLER *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 1404, Misc. KELLY *v.* KANSAS ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 387 F. 2d 140.

No. 1406, Misc. BOGART ET UX. *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 1409, Misc. CLARK *v.* LINN, ACTING SHERIFF, ET AL. Sup. Ct. Ind. Certiorari denied.

No. 1416, Misc. MUTCH *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 1418, Misc. ADAMS *v.* ARIZONA ET AL. Sup. Ct. Ariz. Certiorari denied.

No. 1421, Misc. WISLEY *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 1427, Misc. URBANO *v.* CALISSI ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 384 F. 2d 909.

No. 1429, Misc. RILEY *v.* NELSON, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 1480, Misc. MCCOLLAUGH *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States.

No. 1431, Misc. WILCOX *v.* TURNER, WARDEN. Sup. Ct. Utah. Certiorari denied.

No. 1434, Misc. GRAY *v.* OCCIDENTAL LIFE INSURANCE CO. OF CALIFORNIA. C. A. 3d Cir. Certiorari denied. Reported below: 387 F. 2d 935.

No. 1473, Misc. LARK *v.* RUNDLE, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Reported below: 387 F. 2d 363.

No. 1440, Misc. OWEN *v.* ELLINGTON, GOVERNOR OF TENNESSEE, ET AL. C. A. 6th Cir. Certiorari denied.

No. 1450, Misc. CHAPPEL *v.* WARDEN, MARYLAND PENITENTIARY. Ct. Sp. App. Md. Certiorari denied.

No. 1455, Misc. COX *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *James R. Willis* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Edward Fenig* for the United States.

No. 1458, Misc. WILLIAMS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. *Emmett Colvin* for petitioner. *Crawford C. Martin,* Attorney General of Texas, and *Howard M. Fender,* Assistant Attorney General, for respondent. Reported below: 427 S. W. 2d 868.

No. 1470, Misc. HELPMAN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 1479, Misc. TAYLOR *v.* PEYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 1472, Misc. PAYNE *v.* HOCKER, WARDEN. Sup. Ct. Nev. Certiorari denied.

No. 1489, Misc. CROCE *v.* SANCHEZ. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 256 Cal. App. 2d 680, 64 Cal. Rptr. 448.

No. 1478, Misc. ATKINS *v.* SULLIVAN. C. A. 10th Cir. Certiorari denied.

No. 1491, Misc. JONES *v.* CALIFORNIA. Ct. App. Cal. 2d App. Dist. Certiorari denied. Reported below: 255 Cal. App. 2d 163, 62 Cal. Rptr. 848.

No. 1492, Misc. STEVENSON *v.* WARDEN, QUEENS COUNTY HOUSE OF DETENTION FOR MEN. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 1493, Misc. OGLESBY *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied.

No. 1508, Misc. HENDERSON *v.* HENDERSON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 1510, Misc. NAM SING SHAK *v.* HAWAII. Sup. Ct. Hawaii. Certiorari denied.

No. 1513, Misc. NAM SING SHAK *v.* HAWAII. Sup. Ct. Hawaii. Certiorari denied.

No. 1514, Misc. NAM SING SHAK *v.* HAWAII. Sup. Ct. Hawaii. Certiorari denied.

No. 1541, Misc. AULL ET AL. *v.* NEW MEXICO. Sup. Ct. N. M. Certiorari denied. *O. R. Adams* for petitioners. Reported below: 78 N. M. 607, 435 P. 2d 437.

No. 1517, Misc. NAM SING SHAK *v.* HAWAII. Sup. Ct. Hawaii. Certiorari denied.

No. 1518, Misc. NAM SING SHAK *v.* HAWAII. Sup. Ct. Hawaii. Certiorari denied.

No. 1218, Misc. HOWARD *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Neil K. Evans* for petitioner. *John T. Corrigan* for respondent.

No. 1615, Misc. IN RE FRANK. Sup. Ct. N. J. Certiorari denied. *Robert P. Hanley* for petitioner.

No. 1211, Misc. JACKSON *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Daniel G. Collins* for petitioner. Reported below: 20 N. Y. 2d 440, 231 N. E. 2d 722.

No. 1363, Misc. BECERA-SOTO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *David S. Cohen* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States. Reported below: 387 F. 2d 792.

No. 1318, Misc. SCHAWARTZBERG *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Mervyn Hamburg* for the United States. Reported below: 382 F. 2d 1012.

No. 1433, Misc. GOODWIN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Solicitor General Griswold* for the United States.

Rehearing Denied.

No. 445. AVCO CORP. *v.* AERO LODGE NO. 735, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, ET AL., 390 U. S. 557;

No. 1140. CHANEY *v.* STATE BAR OF CALIFORNIA ET AL., 390 U. S. 1011;

No. 1199. MEAUX ET AL. *v.* UNITED STATES, 390 U. S. 1026;

No. 652, Misc. ANDERSON *v.* NELSON, WARDEN, 390 U. S. 523;

No. 854, Misc. FONTAINE *v.* CALIFORNIA, 390 U. S. 593;

No. 1054, Misc. HENIG ET AL. *v.* ODORIOSO ET AL., 390 U. S. 1016; and

No. 1209, Misc. ROSS *v.* CRAVEN, WARDEN, 390 U. S. 1032. Petitions for rehearing denied.

No. 59. BANKS *v.* CHICAGO GRAIN TRIMMERS ASSN., INC., ET AL., 390 U. S. 459. Petition for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

No. 70. ALITALIA-LINEE AEREE ITALIANE, S. P. A. *v.* LISI ET AL., 390 U. S. 455. Motion of International Air Transport Assn. for leave to file a brief, as *amicus curiae*, granted. Petition for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion and petition. *Harold L. Warner, Jr.*, *Carl S. Rowe*, and *Paul G. Pennoyer, Jr.*, on the motion in support of the petition.

MAY 27, 1968.

Miscellaneous Orders.

No. —. SHIFFMAN *v.* SELECTIVE SERVICE LOCAL BOARD No. 5 ET AL. C. A. 2d Cir. Application for writ of injunction or stay, presented to MR. JUSTICE HARLAN, and by him referred to the Court, denied. (See concurring memorandum of MR. JUSTICE STEWART and dissent of MR. JUSTICE DOUGLAS below.) *Melvin L. Wulf* for applicant. *Solicitor General Griswold* for respondents in opposition.

No. —. ZIGMOND *v.* SELECTIVE SERVICE LOCAL BOARD No. 16 ET AL. C. A. 1st Cir. Application for stay, presented to MR. JUSTICE FORTAS, and by him referred to the Court, denied. *Solicitor General Griswold* for respondents in opposition. Reported below: 396 F. 2d 290.

MR. JUSTICE STEWART, concurring.*

In voting to deny these applications, I intimate no view upon the merits of the applicants' substantive claims, which are not now before us.

MR. JUSTICE DOUGLAS, dissenting.†

In these cases the Courts of Appeals for the First and Second Circuits have held that § 10 (b)(3) of the Universal Military Training and Service Act, as amended by the Military Selective Service Act of 1967, 81 Stat. 104, 50 U. S. C. App. § 460 (b)(3) (1964 ed., Supp. III),[1]

*This memorandum applies also to *Shiffman* v. *Selective Service Local Board No. 5 et al., supra.*

†This opinion applies also to *Shiffman* v. *Selective Service Local Board No. 5 et al., supra.*

[1] "No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction . . . ."

precludes pre-induction judicial review of action taken against the two applicants by their local draft boards. They seek stays of induction into the Armed Forces until this Court has acted on certiorari petitions they will file, arguing that § 10 (b)(3) is inapplicable or may not constitutionally be applied to require registrants either to forgo the exercise of First Amendment rights or to vindicate them by defending a criminal prosecution.[2]

Applicant Shiffman's Local Board declared him delinquent, canceled his II–A occupational deferment and reclassified him I–A after Shiffman had "turned in" his draft classification card to the Government in an anti-war protest. He was then ordered to report for induction. Applicant Zigmond was classified I–A, but, having reached the age of 26, should ordinarily not have been called for induction until younger eligible registrants in the draft pool had been taken (see 32 CFR § 1631.7). Nevertheless, he received a delinquency notice followed by his induction notice soon after "turning in" to the Government both his draft registration and classification certificates as a sign of protest.

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[2] *Oestereich* v. *Selective Service Local Board No. 11*, certiorari granted, *ante*, p. 912, raises the same issue presented in these cases, *viz.*, whether § 10 (b)(3) may, consistent with the First Amendment, preclude judicial review of petitioner's punitive reclassification and order to report for induction made by his local board after petitioner had returned his Selective Service registration certificate to the Government as a protest against the war in Vietnam. Although the Solicitor General supported that petition on the ground that § 10 (b)(3) should not be construed to preclude judicial review of local board action terminating an express statutory exemption granted by Congress, the writ we issued was unrestricted. The question of the validity of § 10 (b)(3) in cases raising First Amendment defenses to reclassification and induction is now pending before this Court, and these cases clearly come within the rule of *Yasa* v. *Esperdy*, 80 S. Ct. 1366, and *Keith* v. *New York*, 79 S. Ct. 938, in which stays were granted because similar or identical issues were before the Court in other cases.

I would grant the stays [3] as I am unable to see any place in our constitutional system for Selective Service delinquency regulations employed to penalize or deter exercise of First Amendment rights.

The First Amendment means that whatever speech or protest a person makes, he may not, I submit, be taken by the neck by the Government and subjected to punishment, penalties, or inconveniences for making it.

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[3] The factors which we consider in passing upon stay applications include the likelihood that the case will command the vote of four Justices upon petition for certiorari (*Appalachian Power Co.* v. *American Institute of C. P. A.*, 80 S. Ct. 16 (MR. JUSTICE BRENNAN)); the likelihood of real and irreparable injury to the applicant if stay is denied (*Public Service Board of Vermont* v. *United States*, 87 S. Ct. 3 (MR. JUSTICE HARLAN); *Long Beach Federal Savings & Loan Assn.* v. *Federal Home Loan Bank*, 76 S. Ct. 32 (MR. JUSTICE DOUGLAS)); the existence of an important question not previously passed on by the Court (*McLeod* v. *General Electric Co.*, 87 S. Ct. 5 (MR. JUSTICE HARLAN)); possible mootness occurring if a stay is denied (*In re Bart*, 82 S. Ct. 675 (MR. CHIEF JUSTICE WARREN)); and pendency of similar or identical issues before the Court in other cases (*Yasa* v. *Esperdy*, 80 S. Ct. 1366 (MR. JUSTICE HARLAN); *Keith* v. *New York*, 79 S. Ct. 938 (MR. JUSTICE HARLAN)). And see *Rosenberg* v. *United States*, 346 U. S. 273, 289 (separate statement of Mr. Justice Frankfurter).

Although the Selective Training and Service Act of 1940 made no explicit provision for judicial review of the action of local boards, and in fact made their decisions "final," we found that Congress had not intended to deny all judicial review of a local board's action. Rather, we concluded, judicial review was available to the extent of determining in the criminal action whether there was any basis in fact for the classification given the registrant by his local board. *Estep* v. *United States*, 327 U. S. 114. We noted that we could "assume that where only one judicial remedy is provided, it *normally* would be deemed exclusive," 327 U. S., at 125. (Emphasis added.) We were not, however, then dealing with the question whether a restrictive review provision might itself offend the Constitution in circumstances where it operates to chill the effective exercise of First Amendment rights. See *Dombrowski* v. *Pfister*, 380 U. S. 479. That is the question which is presented here with respect to § 10 (b) (3).

No. 232. UNITED STATES *v.* O'BRIEN; and

No. 233. O'BRIEN *v.* UNITED STATES, *ante*, p. 367. Motion of William Sloane Coffin, Jr., et al. for leave to file a brief, as *amici curiae*, after argument, denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion. *Abraham Goldstein, William P. Homans, Jr., Telford Taylor*, and *Leonard B. Boudin* on the motion.

No. 801. SPINELLI *v.* UNITED STATES. C. A. 8th Cir. The order of this Court of March 4, 1968, granting petition for certiorari, 390 U. S. 942, is modified so as to limit review in this Court to the question of the constitutional validity of the search and seizure. MR. JUSTICE MARSHALL took no part in the consideration or decision of this order.

No. 1590, Misc. LAUCHLI *v.* UNITED STATES. Motion for leave to file petition for writ of habeas corpus denied.

No. 1532, Misc. FAIR *v.* SUPREME COURT OF FLORIDA ET AL. Motion for leave to file petition for writ of mandamus denied.

Certiorari Granted. (See also No. 791, Misc., *ante*, p. 464; and No. 798, Misc., *ante*, p. 470.)

No. 1266. ZENITH RADIO CORP. *v.* HAZELTINE RESEARCH, INC., ET AL. C. A. 7th Cir. Certiorari granted. *Thomas C. McConnell* and *Francis J. McConnell* for petitioner. *John T. Chadwell, M. Hudson Rathburn*, and *Laurence B. Dodds* for respondents. Reported below: 388 F. 2d 25.

No. 1339. NATIONAL LABOR RELATIONS BOARD *v.* STRONG, DBA STRONG ROOFING & INSULATING CO. C. A. 9th Cir. Certiorari granted. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli*, and *Norton J.*

Come for petitioner. *William B. Carman* and *Charles G. Bakaly, Jr.*, for respondent. Reported below: 386 F. 2d 929.

No. 585, Misc. PALMIERI *v.* FLORIDA. Sup. Ct. Fla. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted and case transferred to appellate docket. *Earl Faircloth*, Attorney General of Florida, and *Harold Mendelow*, Assistant Attorney General, for respondent. Reported below: 198 So. 2d 633.

Certiorari Denied.

No. 1249. SIDARY, AKA SIDNEY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Walter G. Stumbo* and *John E. Stumbo* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson*, and *Beatrice Rosenberg* for the United States. Reported below: 387 F. 2d 698.

No. 1302. FITZGERALD *v.* CATHERWOOD, INDUSTRIAL COMMISSIONER OF NEW YORK. C. A. 2d Cir. Certiorari denied. *Bernard H. Fitzpatrick* for petitioner. *Louis J. Lefkowitz*, Attorney General of New York, *Samuel A. Hirshowitz*, First Assistant Attorney General, and *Joel Lewittes*, Assistant Attorney General, for respondent. Reported below: 388 F. 2d 400.

No. 1307. JULES HAIRSTYLISTS OF MARYLAND, INC., ET AL. *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. *Paul B. Engel* for petitioners. *Solicitor General Griswold, Assistant Attorney General Rogovin*, and *Crombie J. D. Garrett* for the United States et al.

No. 1309. KRESGE FOUNDATION *v.* LOUIS SCHLESINGER CO. C. A. 3d Cir. Certiorari denied. *Robert P. Douglass* for petitioner. *William L. Greenbaum* for respondent. Reported below: 388 F. 2d 208.

No. 1311. McGANN, ADMINISTRATOR *v.* DISTRICT OF COLUMBIA. C. A. D. C. Cir. Certiorari denied. *James P. Burns* for petitioner. *Charles T. Duncan, Hubert B. Pair, Richard W. Barton,* and *David P. Sutton* for respondent.

No. 1313. BANK OF THE SOUTHWEST NATIONAL ASSOCIATION, HOUSTON, TRUSTEE *v.* PHINNEY, DISTRICT DIRECTOR OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. *Charles W. Hall* for petitioner. *Solicitor General Griswold, Assistant Attorney General Rogovin,* and *Howard J. Feldman* for respondent. Reported below: 392 F. 2d 680.

No. 1314. INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIPBUILDERS, BLACKSMITHS, FORGERS & HELPERS *v.* BRASWELL. C. A. 5th Cir. Certiorari denied. *Louis Sherman* for petitioner. *Robert E. McDonald, Jr.,* for respondent. Reported below: 388 F. 2d 193.

No. 1315. DUNCAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *John J. Flynn* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States. Reported below: 392 F. 2d 539.

No. 1319. HAGERTY *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. *G. W. Gill, Sr.,* for petitioner. Reported below: 251 La. 477, 205 So. 2d 369.

No. 1323. BARBEE ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Hume Cofer* and *John D. Cofer* for petitioners. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Paul C. Summitt* for the United States. Reported below: 392 F. 2d 532.

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No. 1351. MOGGE ET AL. *v.* DISTRICT NO. 8, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL–CIO. C. A. 7th Cir. Certiorari denied. *Barnabas F. Sears* for petitioners. *Sheldon M. Charone* for respondent. Reported below: 387 F. 2d 880.

No. 1072. HOLMES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Kenneth S. Jacobs* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States. Reported below: 387 F. 2d 781.

MEMORANDUM OF MR. JUSTICE STEWART.

This case, like *Hart* v. *United States,* No. 1044, Misc., *post,* p. 956, involves the power of Congress, when no war has been declared, to enact a law providing for a limited period of compulsory military training and service, with an alternative of compulsory domestic civilian service under certain circumstances. It does not involve the power, in the absence of a declaration of war, to compel military service in armed international conflict overseas. If the latter question were presented, I would join MR. JUSTICE DOUGLAS in voting to grant the writ of certiorari.

MR. JUSTICE DOUGLAS, dissenting.

Petitioner, who describes himself as a Jehovah's Witnesses minister, was classified by his Selective Service Appeal Board in August 1965 as a conscientious objector. See § 6 (j) of the Universal Military Training and Service Act of 1948, 62 Stat. 612 (now the Military Selective Service Act of 1967), as amended, 81 Stat. 104, 50 U. S. C. App. § 456 (j) (1964 ed., Supp. III). Under § 6 (j), as it read during all dates relevant to this case, a conscientious objector who, like petitioner, is also opposed to noncombatant military service, may in lieu of induction "be ordered by his local board . . . to perform . . . such civilian

work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate . . . ." Beginning in October 1965 petitioner and his Local Board exchanged a series of letters in which the Board explained to petitioner the types of civilian work available and petitioner asserted his religious scruples against serving the United States Government in any capacity, including civilian work programs. Petitioner reiterated this position in a personal meeting with his Local Board.

On February 7, 1966, the Board sent petitioner an order to report on February 21 to an Illinois state hospital for civilian work assignment. However, on the day he was due to report, petitioner notified the Board that he refused to do so for religious reasons.

By indictment, petitioner was charged with willful failure to report as ordered, in violation of § 12 (a) of the Act.[1] At his nonjury trial petitioner moved for judgment of acquittal. That motion was denied, petitioner was convicted and sentenced to three years' imprisonment, and the Court of Appeals affirmed, one judge dissenting. *United States* v. *Holmes*, 387 F. 2d 781 (C. A. 7th Cir.).

Petitioner asks this Court to decide whether a draft[2] of men into the Armed Forces in time of peace is con-

[1] Section 12 (a) provides in part: "Any member of the Selective Service System . . . charged as herein provided with the duty of carrying out any of the provisions of this title, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both . . . ."

[2] There is no permissible distinction between men conscripted for armed, combatant service overseas and those drafted for civilian work. Initially, the Government purports to uphold the conscription both of combatants for armed service and conscientious objectors

stitutionally permissible. In the absence of a declaration of war, he argues, a draft is not authorized and is equivalent to involuntary servitude. The Court of Appeals held that Congress' power to conscript men into the Armed Forces was not so limited, and the Government, opposing certiorari, states that "[e]ven assuming that the present time is one of 'peace,' it has long been settled that the power to raise armies by conscription is not limited to periods of war or national emergency," citing *United States* v. *Henderson*, 180 F. 2d 711 (C. A. 7th Cir.), cert. denied, 339 U. S. 963, and *Etcheverry* v. *United States*, 320 F. 2d 873 (C. A. 9th Cir.), cert. denied, 375 U. S. 930.

It is clear from our decisions that conscription is constitutionally permissible when there has been a declaration of war. But we have never decided whether there may be conscription in absence of a declaration of war. Our cases suggest (but do not decide) that there may not be.

In *Hamilton* v. *Regents of the University of California*, 293 U. S. 245, 265, Mr. Justice Cardozo, concurring (joined by Justices Brandeis and Stone), indicated that "governmental power in the exaction of military service when the nation is at peace" was an open question.

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for "civilian work" under the same source of power—Congress' war power and power to raise armies. Moreover, the loss of liberty for a conscientious objector drafted into civilian work is not appreciably less than that suffered by the combatant soldier. Except in unusual cases, the Local Board will not permit the conscientious objector to fulfill his work obligation in his home town (32 CFR § 1660.21 (a)). The conscientious objector may indeed be ordered to do civilian work overseas (32 CFR § 1660.31 (b)). There is nothing in the Act or regulations which precludes assigning the conscientious objector to civilian work in a theater of war, where his personal safety is imperiled. If he does not perform the assigned work "satisfactorily," he faces prosecution (32 CFR §1660.31 (a)).

At the time Mr. Justice Cardozo wrote (1934) the Selective Draft Act of 1917, 40 Stat. 76, had been tested in this Court and its validity and congressional power to conscript men for military service upheld. This Act, however, was enacted May 18, 1917, *after* Congress had declared war on the German Empire on April 6, 1917. (S. J. Res. No. 1, 65th Cong., 40 Stat. 1.) Thus, the Court had no occasion to reach the problem of drafting men in a technical time of peace, that is, a period not covered by declaration of war. *Selective Draft Law Cases*, 245 U. S. 366. There the Court stated that the basis of congressional power to conscript had to be found in its Art. I, § 8, power to "make rules for the government and regulation of the land and naval forces," to "raise and support armies," and "to declare war." *Id.*, at 377.

None of the decisions prior to the *Selective Draft Law Cases* touches directly on the power to conscript in peacetime, and the reason would appear to be that prior to 1917 the Congress had not enacted a true conscription or draft provision. In 1794 and 1797 Congress enacted measures authorizing the President to require state governors to organize a militia. (1 Selective Service System, Backgrounds of Selective Service, Vol. 1, 59–60 (1947).) In 1814 President Madison by his Secretary of War, James Monroe, proposed a form of draft into the federal army which would raise some 80,000 recruits for two years' service. (6 Brant, James Madison 337 (1961); 2 Selective Service System, The Selective Service Act, Vol. III, App. A, 143 (1954).) A bill along this line passed the Senate, 19 to 12, but was defeated in the House (6 Brant, at 349, 359–360),[3] and the War of 1812 was completed with use of volunteers and the state militia.

[3] The House bill required classification of all free, white males 18 to 45 into groups of 25 men. Each group would have to provide one recruit. Under Monroe's version, if this was not done, the recruit

The Civil War provision, the Enrollment Act of 1863, 12 Stat. 731, was the first enactment resembling what can be called a "draft" provision.[4] It created, however, a "draft" on paper only. Under § 13 of the Enrollment Act enrollees could procure a substitute to avoid service

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would be chosen by draft, but the drafted man could provide a substitute. (2 Selective Service System, The Selective Service Act, Vol. III, App. A, 145.) Under the House version failure to provide the recruit resulted in a monetary forfeiture levied on each member of the group. (*Id.*, at 153–154.) Daniel Webster strenuously argued in the House of Representatives that the draft bill was unconstitutional. He noted that the draft power claimed for Congress by Madison and Monroe was not limited to time of war or invasion and would permit a draft of men for any type of military service, at home or abroad, at the discretion of the Government. (Daniel Webster, Speech Against the Conscription Bill, House of Representatives, December 9, 1814, in L. Schlissel ed., Conscience in America 67 (1968). And see 86 Cong. Rec. App. 5210.) "Who will show me," he argued, "any constitutional injunction, which makes it the duty of the American people to surrender every thing valuable in life, & even life itself, not when the safety of their country & its liberties may demand the sacrifice, but whenever the purposes of an ambitious & mischievous Government may require it? Sir, I almost disdain to go to quotations & references to prove that such an abominable doctrine has no foundation in the Constitution of the country." (*Id.*, at 68.)

[4] The Act of 1863 provided in § 1, "That all able-bodied male citizens of the United States, and persons of foreign birth who shall have declared on oath their intention to become citizens under and in pursuance of the laws thereof, between the ages of twenty and forty-five years, except as hereinafter excepted, are hereby declared to constitute the national forces, and shall be liable to perform military duty in the service of the United States when called out by the President for that purpose."

The country was divided up into enrollment districts, and enrollment officers made up two types of lists: class No. 1 consisting of all unmarried eligible enrollees plus others 20 to 35; class No. 2 consisting of the others. Men could be called up during a two-year period following the July after their enrollment and would have to serve up to three years. A pecking-order for draft purposes was

or buy their way out for $300 or less. The result was that "[t]he poor hired themselves to serve for the well-to-do, as the law contemplated; then a flourishing traffic in substitution blossomed out . . . ." (Backgrounds of Selective Service, *supra*, at 66.) The Act procured only 6% of the total manpower for the North in the war: 46,000 conscripts and 118,000 substitutes. See J. Randall & D. Donald, The Civil War and Reconstruction 315 (2d ed. 1961); and see Brandon, Where the Action Was in 1863, The Progressive, April 1968, at 19, and J. McCague, The Second Rebellion (1968), discussing extensive riots ignited by the 1863 Conscription Act.

The Act of 1863 was never directly attacked in this Court, and thus no opportunity to weigh the significance of the absence of a declaration of war (see the *Prize Cases*, 2 Black 635) arose. Many years later this Court twice suggested in dicta that the Act of 1863 was valid, but the absence of a declaration of war was not considered.[5] These dicta would have particularly little weight

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compiled on a draw or lottery-type system. The President would inform each enrollment district of its conscription quota. Exemptions were given the physically and mentally handicapped and sole surviving sons of widows, widowers with young dependent children, etc.

[5] In the *Selective Draft Law Cases*, 245 U. S. 366, 388, the Court said: "Cogency, however, if possible, is added to the demonstration by pointing out that in the only case to which we have been referred where the constitutionality of the Act of 1863 was contemporaneously challenged on grounds akin to, if not absolutely identical with, those here urged, the validity of the act was maintained for reasons not different from those which control our judgment. (*Kneedler* v. *Lane*, 45 Pa. St. 238.)" In *Lichter* v. *United States*, 334 U. S. 742, 757, n. 4, the Court said: "The draft was put in force both by the Union and by the Confederacy during the Civil War and its validity was sustained by the courts in both North and South. 'The power of coercing the citizen to render military service, is indeed a transcendent power, in the hands of any government; but so far from being inconsistent with liberty, it is essential

in view of the fact that what the 1863 Act created was not a true "draft" as we understand that term today.

Dicta in three post-Civil War cases indicated in a broad sense that the Court believed the Congress had power to enact a draft. *Tarble's Case*, 13 Wall. 397; *Street* v. *United States*, 133 U. S. 299; and *In re Grimley*, 137 U. S. 147. But none of these cases factually concerned conscription, and there is no reason to believe that the Court, in indicating that conscription could be valid, had in mind a peacetime draft.

During the Spanish-American War no draft provision was enacted—Congress merely called for a volunteer army. Apart from certain laws reorganizing the national militia, it was not until the Selective Draft Act of 1917 that Congress provided for conscription into the Regular Army.

Accordingly, Mr. Justice Cardozo's statement in *Hamilton* that Congress' power to institute a peacetime draft was an open question is vindicated by the pre-1934 decisions of this Court. Turning to post-1934 decisions of this Court, the same conclusion follows. The Act of 1917 was superseded by the Selective Training and Service Act of 1940, 54 Stat. 885. No decision directly attacking the constitutional basis of congressional power to conscript, as exercised in the 1940 Act, came before this Court. In those decisions involving application of the Act, the attempt to induct the potential soldier had occurred after the declaration of war with Japan on December 8, 1941 (55 Stat. 795), so that the issue of a peacetime draft was not before the Court. Thus, in *Billings* v. *Truesdell*, 321 U. S. 542, where a 1942 induction was in issue, the Court stated: "We have no doubt of the power of Congress to

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to its preservation.'" The *Lichter* case itself did not concern a conscription act, but rather statutes enacted in 1942–1945 providing for recovery of excessive wartime profits, applied in that case to 1942–1943 earnings. Peacetime exercise of the war power was, therefore, not involved in *Lichter*.

enlist the manpower of the nation *for the prosecution of the war* and to subject to military jurisdiction those who are unwilling, as well as those who are eager, to come to the defense of their nation in its hour of peril." *Id.*, at 556. (Emphasis added.)

In 1948 the Act of 1940 was superseded by the Universal Military Training and Service Act, 62 Stat. 604, which in turn forms the basis of the current draft law, the Military Selective Service Act of 1967, 81 Stat. 100, 50 U. S. C. App. § 451 *et seq.* (1964 ed., Supp. III). No direct attack was made in this Court on the power of Congress to conscript, as exercised in the 1948 Act, but application of the Act was before the Court in two Korean War period cases. *Orloff* v. *Willoughby*, 345 U. S. 83, concerned a petitioner called up under the doctors' draft provisions of the Act who demanded that he either be commissioned an officer and assigned medical duties in the area of his specialty or released. The doctor was inducted on July 26, 1951, before the effective date of termination of our state of war with either Germany (October 19, 1951) or Japan (April 28, 1952). No question of unlawful peacetime draft was raised or alluded to in the case.

United States v. *Nugent*, 346 U. S. 1, concerned the procedures for administrative appeal of those claiming to be conscientious objectors, one of the petitioners having been called for induction in November 1951 and the other in February 1952. The Court said:

> "The Selective Service Act is a comprehensive statute designed to provide an orderly, efficient and fair procedure to marshal the available manpower of the country, to impose a common obligation of military service on all physically fit young men. It is a valid exercise of the *war power*. It is calculated to function—it functions today—in times of peril." *Id.*, at 9, decided June 8, 1953. (Emphasis added.)

In that case the declaration of war against Japan in 1941 still had effect at the time of petitioners' induction, although there had been no declaration of war accompanying the Korean conflict.[6]

The Court has held that "[w]ar does not cease with a cease-fire order . . . ." *Ludecke* v. *Watkins*, 335 U. S. 160, 167. It "continues for the duration of [the] emergency" (*Woods* v. *Miller Co.*, 333 U. S. 138, 141), and empowers the Government "to guard against the immediate renewal of the conflict." *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, 161 (quoting from *Stewart* v. *Kahn*, 11 Wall. 493, 507). In the *Kentucky Distilleries* case the Court indicated that war powers endure for some purposes until the treaty of peace is effective.[7] If, for the

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[6] Cf. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 642, where Mr. Justice Jackson, concurring, said:

"[N]o doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture."

[7] The Court has used different tests to determine when war has ended depending on the nature of the war power sought to be exercised. In *Lee* v. *Madigan*, 358 U. S. 228, involving a prohibition of the Articles of War against court-martial trials for rape or murder committed in the United States "in time of peace," and in *Reid* v. *Covert*, 354 U. S. 1, 33–35 (opinion of BLACK, J.), concerning court-martial jurisdiction of civilians abroad, the war was said to have ended with the cessation of hostilities. In respect to seizure and removal of aliens from this country, *Ludecke* v. *Watkins*, 335 U. S. 160; summary exclusion of aliens without hearing, *Knauff* v. *Shaughnessy*, 338 U. S. 537; imposition of housing and rent controls, *Woods* v. *Miller Co.*, 333 U. S. 138; and conserving manpower by forbidding liquor, *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, the Court has held that "war" extends beyond the cessation of hostilities. In *Knauff* the Court said as recently as 1950 that we were then in a state of war. 338 U. S., at 546. Because no decision of this Court

purposes of the draft, war continues until the treaty is effective, the attempted inductions of the petitioners in the *Nugent* case were manifestly not peacetime inductions.

In World War II Germany surrendered May 8, 1945, and Japan surrendered September 2, 1945. See *Lee* v. *Madigan*, 358 U. S. 228, 230. On December 31, 1946, the President proclaimed the cessation of hostilities, declaring that a state of war still existed. (12 Fed. Reg. 1.) Congress declared the state of war with Germany terminated on October 19, 1951 (H. J. Res. 289, 65 Stat. 451) and the President proclaimed the same on October 24, 1951 (66 Stat. c3). The effective date of termination of a state of war with Japan was April 28, 1952, when the Japanese Peace Treaty took effect (66 Stat. c31). See *Lee* v. *Madigan*, 358 U. S. 228, 230.

Mr. Justice Cardozo's question about peacetime draft seems, therefore, to be an open one still. While some decisions suggest that war powers may be exercised in an "emergency" prior to declaration of war, *e. g.*, *Silesian-American Corp.* v. *Clark*, 332 U. S. 469, 476, there are other decisions directly linking the power of conscription to Congress' power under Art. I, § 8, cl. 11, to "declare war." [8] For example, in *United States* v. *Mac-*

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has faced the question directly of the need for a declaration of war to uphold conscription, no decision indicates when "war" ends for draft purposes.

[8] The case against the constitutionality of a peacetime draft is forcefully argued in a lawyers' brief on the subject which Senator Wheeler had printed in the Congressional Record when Congress was debating the bill that became the Selective Service Act of 1940. The argument, praised by Senator Wheeler as a "real contribution" to the debate, reviews the history of conscription in England prior to the American Revolution, concludes that peacetime draft was not tolerated there, and urges that the Framers of the Constitution intended Congress to "raise armies" in the manner by which they were raised in England. 86 Cong. Rec. App. 5206–5210. Jefferson

intosh, 283 U. S. 605, the Court said: "In express terms Congress is empowered 'to declare war,' which necessarily connotes the plenary power to wage war with all the force necessary to make it effective; and 'to raise . . . armies,' which necessarily connotes the like power to say who shall serve in them and in what way." Id., at 622.

This Court has not reached the merits of the question which I have been discussing since the *Prize Cases*, 2 Black 635, decided in 1863. Even though Lincoln was putting down an insurrection within the country, the Court was divided five-to-four, Mr. Chief Justice Taney

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stated in 1777 in a letter to John Adams: "Our people, even under the monarchical government, had learned to consider it [the draft] as the last of all oppressions." Jeffersonian Cyclopedia 263 (1900).

Chief Justice Taney said of the congressional power "to raise and support armies": "[T]he words themselves, even if they stood alone, will not, according to their known and established use and meaning in the English language, justify this construction [permitting conscription].

"During the period when the United States were English Colonies, the Army of England,—the standing army,—was always raised by voluntary enlistments,—and the right to coerce all the able bodied subjects of the Crown into the ranks of the Army and subject them to military law, was not claimed or exercised by the English government—and when the power to raise and support armies was delegated to Congress [by the States], the words of the grant necessarily implied that they were to be raised in the usual manner.—And the general government has always heretofore so understood them and has uniformly by its own officers recruited the ranks of its 'land forces' by voluntary enlistments for a specified period." Taney, Thoughts on the Conscription Law of the U. States—Rough Draft Requiring Revision, in P. Auchampaugh ed., A Great Justice on State and Federal Power, 18 Tyler's Quarterly Historical & Genealogical Magazine 72, 81 (1936). See also *Kneedler* v. *Lane*, 45 Pa. 238, 254–255 (concurring opinion of Woodward, J.); F. Black, The Selective Draft Cases—A Judicial Milepost on the Road to Absolutism, 11 B. U. L. Rev. 37 (1931).

and Justices Catron, Clifford, and Nelson [9] voting that the President alone had no power to place an embargo under which a British ship was seized while in Hampton Roads.

Putting down an internal insurrection, like defending our shores against an aggressor, is certainly quite different from launching hostilities against a nation or a people overseas.[10] I express no opinion on the merits.

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[9] The dissent by Mr. Justice Nelson, which the other three joined, stated:

"I am compelled to the conclusion that no civil war existed between this Government and the States in insurrection till recognized by the Act of Congress 13th of July, 1861; that the President does not possess the power under the Constitution to declare war or recognize its existence within the meaning of the law of nations, which carries with it belligerent rights, and thus change the country and all its citizens from a state of peace to a state of war; that this power belongs exclusively to the Congress of the United States and, consequently, that the President had no power to set on foot a blockade under the law of nations, and that the capture of the vessel and cargo in this case, and in all cases before us in which the capture occurred before the 13th of July, 1861, for breach of blockade, or as enemies' property, are illegal and void, and that the decrees of condemnation should be reversed and the vessel and cargo restored." 2 Black 698–699.

[10] See *United States* v. *Smith*, 27 Fed. Cas. 1192 (No. 16,342) (C. C. D. N. Y. 1806). The defendant was charged with helping outfit a military expedition against a foreign nation with which the United States was at peace. (See 1 Stat. 384.) As one defense, he proposed to call witnesses who would prove that the President had consented to the military venture against Spanish holdings in South America. The report of the case contains an extensive, scholarly debate between counsel on the President's power to himself order a foreign invasion.

A two-judge court, speaking through Paterson, J., held that the Constitution, "which measures out the powers and defines the duties of the president, does not vest in him any authority to set on foot a military expedition against a nation with which the United States are at peace." (At 1229–1230.) "Does he possess the power of

But there is a weighty view that what has transpired respecting Vietnam is unconstitutional, absent a declaration of war; that the Tonkin Gulf Resolution is no constitutional substitute for a declaration of war; that the making of appropriations was not an adequate substitute; and that "executive war-making is illegal." Those are the views of Francis D. Wormuth in The Vietnam War: The President versus the Constitution (1968).[11] Many share his views.[12] Another professor has recently pointed out the serious deleterious effects in the country stemming from the Court's failure to decide whether the President may constitutionally wage a foreign war in Vietnam without a declaration of war by Congress. Hughes, Civil Disobedience and the Political Question Doctrine, 43 N. Y. U. L. Rev. 1 (1968). In these types of cases, he says, "to deny certiorari, to dismiss suits without

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making war? That power is exclusively vested in Congress . . . . [T]he executive magistrate . . . and commander-in-chief of the forces by sea and land [may] . . . repel an invading foe. But to repel aggressions and invasions is one thing, and to commit them against a friendly power is another. . . . There is a manifest distinction between our going to war with a nation at peace, and a war being made against us by an actual invasion, or a formal declaration. In the former case, it is the exclusive province of congress to change a state of peace into a state of war. A nation, however, may be in such a situation as to render it more prudent to submit to certain acts of a hostile nature, and to trust to negotiations for redress, than to make an immediate appeal to arms. Various considerations may induce to a measure of this kind; such as motives of policy, calculations of interest, the nature of the injury and provocation, the relative resources, means and strength of the two nations, &c. and, therefore, the organ intrusted with the power to declare war, should first decide whether it is expedient to go to war, or to continue in peace . . . ." (At 1230–1231.)

[11] An Occasional Paper published by the Center for the Study of Democratic Institutions, Santa Barbara, California.

[12] There are of course opposed views; and many *pros* and *cons* of the issue are canvassed in The Vietnam War and International Law (Amer. Soc. Int. Law, R. Falk ed.) also published in 1968.

a reasoned opinion has a tendency to arouse suspicion that the Court is simply shrinking from making pronouncements about the basic norms of the [constitutional] system." *Id.*, at 18. If an executive war is unconstitutional, he says, but the Court refuses to invalidate it, then the President's "conduct strengthens the moral case for disobeying executive orders which stem from his departure from constitutional demands." *Id.*, at 19.

As I said, the question whether there can be conscription when there has not been a declaration of war, has never been decided by this Court. It is an important question. It is a recurring question. It is coming to us in various forms in many cases as a result of the conflict in Vietnam. I think we owe to those who are being marched off to jail for maintaining that a declaration of war is essential for conscription an answer to this important undecided constitutional question.

I would therefore grant certiorari in this case.

No. 1276. DANILA ET AL. *v.* DOBREA, EXECUTOR. Sup. Ct. Ohio. Certiorari denied. *John R. Vintilla* for petitioners. *John J. Sibisan* for respondent.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK concurs, dissenting.

Respondent was appointed by an Ohio probate court executor of the estate of John Danila, whose will left over $40,000 to the seven petitioners, relatives of Danila's residing in Romania. The residue, securities constituting the greater part of the estate, was left to two charities and a friend of the deceased. Respondent notified petitioners by mail of the administration, and they employed Ohio counsel, who communicated with counsel for respondent and filed with the probate court a formal appearance. One month later respondent filed his final

accounting and proposed plan of distribution, which charged to petitioners costs of administration and taxes; and respondent moved to be appointed testamentary trustee over the gifts to petitioners. A hearing date was set, but the only notice thereof was by publication. There was no personal notification to either petitioners or their attorney, although respondent knew how to reach them. The distribution proposed by respondent was then approved by the probate court.

Petitioners moved to set aside the final probate court order on the ground that notice by publication was constitutionally insufficient. In denying that motion, the probate court did not consider the due process question, but merely held that two arguments by which petitioners attacked the plan of distribution on the merits were frivolous. His order denying relief was affirmed.

The constitutional question raised here is whether petitioners, once having been notified by the executor that administration was under way, were entitled to actual notice (see *Mullane* v. *Central Hanover Tr. Co.*, 339 U. S. 306) of the hearing on final distribution and of the ancillary proceedings to appoint respondent trustee over their property. A similar issue was raised in *Hanner* v. *DeMarcus*, 390 U. S. 736. As I indicated in my dissent there, the question is a substantial one which should be decided by this Court.

It is said that the probate court in effect reopened the administration by considering at the hearing on motion to reopen certain arguments of petitioners' going to the merits. Nothing in the record, however, suggests that petitioners had a full hearing on the merits at this time, nor even that petitioners had any reason to believe that this hearing, ostensibly on the constitutional adequacy of the notice by publication, was the appropriate time to raise such points. (Compare *In re Ruffalo*, 390 U. S. 544.)

There seems to be some basis for believing that the case is a relic of the Cold War and that petitioners were discriminated against in the administration of this estate because of their Romanian citizenship (cf. *Zschernig* v. *Miller*, 389 U. S. 429), since the pretext for naming the trustee was to ascertain the addresses of the Romanian legatees, already known to their counsel who had appeared for them. In any event, there should be a hearing on the merits, to determine *inter alia*, whether this Ohio probate judge was formulating American foreign policy as was the state judge in *Zschernig* v. *Miller*.

I would grant certiorari.

No. 1305. LAPENIEKS *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Robert D. Hornbaker* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for respondent. Reported below: 389 F. 2d 343.

No. 1327. FLOERSHEIM ET AL. *v.* POWERS, DIRECTOR OF THE DEPARTMENT OF PROFESSIONAL AND VOCATIONAL STANDARDS OF CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. *Murray M. Chotiner* for petitioners. *Thomas C. Lynch,* Attorney General of California, and *Warren H. Deering,* Deputy Attorney General, for respondent. Reported below: 256 Cal. App. 2d 223, 63 Cal. Rptr. 913.

No. 1435, Misc. MEEK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Edward Fenig* for the United States. Reported below: 388 F. 2d 936.

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No. 1375. McMURRAY *v.* WENDELKEN. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BLACK is of the opinion that the Court of Appeals denied petitioner the benefit of controlling Mississippi law in reversing the judgment and directing dismissal of the case. *John Joseph Leahy* for petitioner. *David Cottrell, Jr.*, for respondent. Reported below: 388 F. 2d 553.

No. 722, Misc. HINCKLEY ET AL. *v.* TUTUSKA, SHERIFF. Ct. App. N. Y. Certiorari denied. *Michael F. Dillon* for respondent.

No. 868, Misc. GOTTSCHALK *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Orange. Certiorari denied. *David R. Cadwell* for petitioner.

No. 1177, Misc. BUTLER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States. Reported below: 384 F. 2d 522.

No. 1411, Misc. HAMLETT *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Mervyn Hamburg* for the United States.

No. 1426, Misc. FINN *v.* COMSTOCK, CONSERVATION CENTER SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 1430, Misc. COLE *v.* RUSSELL, WARDEN. C. A. 6th Cir. Certiorari denied. *Philip M. Carden* for petitioner. *George F. McCanless,* Attorney General of Tennessee, for respondent.

No. 1436, Misc. RODRIQUEZ *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 1441, Misc. FRANKLIN *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 1442, Misc. LESER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 390 F. 2d 634.

No. 1443, Misc. LEAKE *v.* VIRGINIA. Sup. Ct. App. Va. Certiorari denied.

No. 1447, Misc. WATSON *v.* COMMON PLEAS COURT OF PHILADELPHIA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 385 F. 2d 401.

No. 1452, Misc. DEBERRY *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. *Matthew J. Perry* for petitioner. Reported below: 250 S. C. 314, 157 S. E. 2d 637.

No. 1453, Misc. DAVIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 1456, Misc. HARSHAW *v.* CORPORATION COUNSEL FOR THE CITY OF FLINT ET AL. C. A. 6th Cir. Certiorari denied.

No. 1461, Misc. RHODES *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied.

No. 1481, Misc. COOPER ET AL. *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 256 Cal. App. 2d 500, 64 Cal. Rptr. 282.

No. 1484, Misc. MOLL *v.* LAVALLEE, WARDEN. Ct. App. N. Y. Certiorari denied. *William Cahn* and *Henry P. DeVine* for respondent. Reported below: 21 N. Y. 2d 706, 234 N. E. 2d 698.

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No. 1482, Misc. SIEGAL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Robert G. Maysack* for the United States. Reported below: 390 F. 2d 147.

No. 1494, Misc. PERKINS *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 174 Ct. Cl. 124.

No. 1495, Misc. GARCIA *v.* RHAY, PENITENTIARY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 1497, Misc. SAAG *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Bruce R. Jacob* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States.

No. 1499, Misc. SMITH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Philip Adams* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States. Reported below: 389 F. 2d 564.

No. 1500, Misc. JIMINEZ *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. *J. Evans Attwell* for petitioner. Reported below: 421 S. W. 2d 910.

No. 1502, Misc. LAMBUR *v.* VIRGINIA. Sup. Ct. App. Va. Certiorari denied.

No. 1505, Misc. BENSON *v.* STATE BOARD OF PAROLE AND PROBATION ET AL. C. A. 9th Cir. Certiorari denied. *Howard R. Lonergan* for petitioner. Reported below: 384 F. 2d 238.

No. 1503, Misc. DELLA VALLE *v.* WARDEN, CLINTON PRISON, ET AL. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied.

No. 1506, Misc. COLON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Robert G. Maysack* for the United States. Reported below: 388 F. 2d 449.

No. 1509, Misc. HANSON *v.* OREGON. Sup. Ct. Ore. Certiorari denied. *Edwin J. Peterson* for petitioner. *George Van Hoomissen* and *Jacob B. Tanzer* for respondent. Reported below: —— Ore. ——, 433 P. 2d 828.

No. 1511, Misc. COPELAND *v.* FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF LAKE COUNTY ET AL. Sup. Ct. Fla. Certiorari denied.

No. 1516, Misc. FAIRCHILD *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 254 Cal. App. 2d 831, 62 Cal. Rptr. 535.

No. 1519, Misc. PEMBERTON *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. *Lee C. Davies, Robert K. Lewis, Jr.,* and *Louis A. Dirker* for petitioner. *James V. Barbuto* and *Stephan M. Gabalac* for respondent.

No. 1520, Misc. OPPENHEIMER *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. *Caryl Warner* for petitioner.

No. 1523, Misc. WEBB, AKA DAVIS *v.* CLINE ET AL. C. A. 5th Cir. Certiorari denied. *John A. Nelson* for petitioner. *Julian D. Clarkson* and *Charles M. Roberts* for respondents.

No. 1526, Misc. WINKER *v.* BURKE, WARDEN. Sup. Ct. Wis. Certiorari denied.

No. 1528, Misc. BURNS *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *George H. Rosen* for petitioner. *Robert C. Williams* for respondent. Reported below: 20 N. Y. 2d 814 and 941, 231 N. E. 2d 291, 233 N. E. 2d 463.

No. 1533, Misc. WALTZ *v.* PORT, U. S. DISTRICT JUDGE, ET AL. C. A. 2d Cir. Certiorari denied.

No. 1566, Misc. TAYLOR *v.* COMSTOCK, CONSERVATION CENTER SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 1575, Misc. CARR *v.* RUSSELL, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 385 F. 2d 531.

No. 1702, Misc. SPEERS ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 387 F. 2d 698.

No. 1044, Misc. HART *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Mercer D. Tate* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States. Reported below: 382 F. 2d 1020.

MR. JUSTICE DOUGLAS, dissenting.

In 1962 when petitioner was classified by his Local Board pursuant to the Universal Military Training and Service Act of 1948, 62 Stat. 604 (now the Military Service Act of 1967), as amended, 81 Stat. 100, 50 U. S. C. App. § 451 *et seq.* (1964 ed., Supp. III), he

sought classification both as a minister (see § 6 (g) and § 16 (g) of the Act) and as a conscientious objector (§ 6 (j)). In his classification questionnaire he described himself as an ordained minister of the Jehovah's Witnesses and stated he was opposed to war in any form and conscientiously objected to participation in noncombatant service in the Armed Forces. The Local Board, in February 1962, classified petitioner as a conscientious objector but denied the ministerial exemption. Petitioner did not seek administrative appeal.

Through October 1964 petitioner wrote a series of letters to the Board describing in more detail his activities as a minister and claiming religious objection to participation in civilian work projects which may be required of registrants classified as conscientious objectors.[1] He stated that under his religious beliefs he was no part of the world governed by secular political systems and could not accept work in a civilian program which substituted for military service. However, he did not formally request reopening of his classification.

On March 25, 1965, the Board mailed to petitioner an order to report to the Board on April 5, 1965, for instructions respecting a civilian work assignment at a state hospital. Petitioner failed to obey the order and was charged by indictment with willful failure to report, in

[1] Section 6 (j) provides in part that a conscientious objector who is also opposed to noncombatant military service, shall in lieu of induction "be ordered by his local board, subject to such regulations as the President may prescribe, to perform . . . such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed . . . to have knowingly failed or neglected to perform a duty required of him under this title." This language is carried over with only slight modification into the 1967 Selective Service Act.

violation of § 12 (a) of the Act.[2] At his nonjury trial, petitioner presented no evidence but moved for acquittal in part on the ground that civilian work under § 6 (j) of the Act could not constitutionally be required of him. The motion was denied, he was convicted and sentenced to four years' imprisonment, and the judgment was affirmed. *United States* v. *Hart,* 382 F. 2d 1020 (C. A. 3d Cir.) (*per curiam*).

Petitioner urges that the power of Congress under Art. I, § 8, of the Constitution to "raise and support armies" does not authorize a draft in time of peace. His argument is: "There is no declared war being conducted today by the United States; thus, the justifications usually given for the draft program, as in the *Selective Draft Law Cases,* 245 U. S. 366 (1918) are not applicable." The Government, in response, claims "[i]t has long been settled that the power to raise armies by conscription is not limited to wartime," and cites *United States* v. *Henderson,* 180 F. 2d 711 (C. A. 7th Cir.), cert. denied, 339 U. S. 963, and *Etcheverry* v. *United States,* 320 F. 2d 873 (C. A. 9th Cir.), cert. denied, 375 U. S. 930.

Petitioner's other contentions are that there was no basis in fact for the Local Board's denial of a minister's exemption, see *United States* v. *Seeger,* 380 U. S. 163, *Estep* v. *United States,* 327 U. S. 114; that his First Amendment rights to freedom of religion have been abridged; and that the congressional power to raise armies does not, as limited by the Necessary and Proper Clause

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[2] Section 12 (a) provides in part: "Any member of the Selective Service System . . . charged as herein provided with the duty of carrying out any of the provisions of this title, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both . . . ."

of Art. I, § 8, authorize draft of conscientious objectors for civilian work so long as there are men in the draft pool eligible for combatant service who are not called for induction.

The Government contends that petitioner does not have standing to attack denial of the minister's exemption because he did not take an administrative appeal of his classification by the Local Board. But the Government quite properly does not claim this bars judicial review of the peacetime draft issue; for it is clear that whatever effect the exhaustion of administrative remedies doctrine may have on the classification issues, it is wholly inapplicable to the constitutional question.

In the first place, at the time of petitioner's classification in February 1962 the question of constitutionality of a peacetime draft was not ripe for review. Petitioner had not then been called for induction and for all that was then known might never be called. It was on July 28, 1965, with the announcement of the President that the strength of our armed forces in Viet Nam would be increased from 75,000 to 125,000 men and monthly draft calls enlarged from 17,000 to 35,000 that the Nation as a whole first probably realized that the Southeast Asian conflict would result in an extensive peacetime draft at home. See 1 Weekly Compilation of Presidential Documents 15 (1965). The impact of the announcement was felt by a rise in number of inductions from 103,328 in 1965 to 343,481 in 1966. See Director of Selective Service, 1966 Annual Report 25 (1967). Petitioner himself had already been "drafted" by that time; but nothing in the Universal Military Training and Service Act or in the regulations promulgated pursuant to it makes the Local Board's March 25, 1965, order to petitioner to report for instructions on civilian work appealable.

Secondly, the Appeal Boards in the Selective Service System do not appear to have jurisdiction to pass on constitutional questions; nor may registrants appeal such questions to them. Under 32 CFR § 1626.2 (a) the registrant may appeal his "classification" and the Appeal Board "shall classify the registrant" (32 CFR § 1626.26 (a)). The Appeal Board's jurisdiction is limited to review of decisions of the Local Boards (32 CFR § 1604.24), and nothing in the Act or Regulations indicates that Local Boards may pass on the constitutionality of a peacetime draft. It would be incongruous indeed to believe that Congress gave the Local Boards this power, since Congress itself specifically provided for a peacetime draft in § 4 (a) of the Act, which states in part: "The President is authorized, from time to time, *whether or not a state of war exists,* to select and induct into the Armed Forces of the United States for training and service . . . such number of persons as may be required to provide and maintain the strength of the Armed Forces." (Emphasis added.)

Thirdly, even if petitioner's Appeal Board could have considered the constitutional question raised here, it seems clear that an appeal on such ground would have been a futile gesture (see *Wolff* v. *Selective Service Local Board No. 16,* 372 F. 2d 817, 825 (C. A. 2d Cir.)), since it would be equivalent to asking the Selective Service System severely to undercut its own authority and to overrule itself (see *Public Utilities Commission of California* v. *United States,* 355 U. S. 534, 539; 3 Davis, Administrative Law § 20.04 (1958)). Accordingly, petitioner has standing to attack the peacetime draft.

The constitutional question presented is precisely the one tendered in *Holmes* v. *United States, ante,* p. 936. I have dissented from a denial of certiorari in that case. This petition should likewise be granted and the case put down for argument along with *Holmes* v. *United States.*

No. 1419, Misc. BEY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States.

No. 1531, Misc. TRIGG *v.* UNITED STATES. C. A. 7th Cir. Motion for leave to amend petition granted. Certiorari denied. *John J. Cleary* for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Edward Fenig* for the United States. Reported below: 392 F. 2d 860.

Rehearing Denied.

No. 1111. JEHOVAH'S WITNESSES IN THE STATE OF WASHINGTON ET AL. *v.* KING COUNTY HOSPITAL UNIT NO. 1 (HARBORVIEW) ET AL., 390 U. S. 598;

No. 1199, Misc. MALDONADO *v.* BOARD OF VETERANS APPEALS, 390 U. S. 1032; and

No. 1310, Misc. SCHLETTE *v.* CALIFORNIA ADULT AUTHORITY ET AL., 390 U. S. 1044. Petitions for rehearing denied.

No. 73. IN RE RUFFALO, 390 U. S. 544. Petition for rehearing denied. MR. JUSTICE STEWART took no part in the consideration or decision of this petition.

No. 630. UNITED STATES ET AL. *v.* COLEMAN ET AL., 390 U. S. 599. Petition for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

No. 948. HIGGINSON *v.* UNITED STATES, 390 U. S. 947. Motion for leave to file petition for rehearing denied.

JUNE 3, 1968.

Miscellaneous Orders.

No. 31, Orig. UTAH *v.* UNITED STATES. Joint motion for leave to file stipulation referred to Special Master. MR. JUSTICE MARSHALL took no part in the consideration or decision of this joint motion. *Phil L. Hansen*, Attorney General of Utah, and *Solicitor General Griswold* for the United States on the motion. [For earlier orders herein, see, *e. g.*, 390 U. S. 977.]

No. 1038. PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY *v.* CITY OF SEATTLE; and

No. 1039. CITY OF SEATTLE *v.* PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY. C. A. 9th Cir. Joint motion to defer consideration of these petitions for writs of certiorari granted. *Clarence C. Dill, William G. Ennis,* and *Bennett Boskey* for Public Utility District No. 1 of Pend Oreille County, and *A. L. Newbould* and *Richard S. White* for the City of Seattle, in both cases. Reported below: 382 F. 2d 666.

No. 1212. UNITED STATES *v.* AUGENBLICK ET AL. Ct. Cl. (Certiorari granted, 390 U. S. 1038.) Motion of respondents to remove case from summary calendar granted. *Joseph H. Sharlitt* for Augenblick, and *Francis J. Steiner, Jr.*, for Juhl, on the motion. *Solicitor General Griswold* for the United States filed a memorandum in support of the motion.

No. 1670, Misc. COLLINS *v.* KLINGER, MENS COLONY SUPERINTENDENT;

No. 1701, Misc. JACKSON *v.* LLOYD, CORRECTIONAL SUPERINTENDENT; and

No. 1749, Misc. HENDERSON *v.* CRAVEN, WARDEN, ET AL. Motions for leave to file petitions for writs of habeas corpus denied.

No. ——. GYURO *v.* CONNECTICUT. Sup. Ct. Conn. Application for stay or bail presented to MR. JUSTICE BLACK, and by him referred to the Court, denied. *Bernard J. Coven* for applicant. *John D. LaBelle* for respondent in opposition. Reported below: 156 Conn. 391, 242 A. 2d 734.

No. 1034. TINKER ET AL. *v.* DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT ET AL. C. A. 8th Cir. (Certiorari granted, 390 U. S. 942.) Motion of United States National Student Assn. for leave to file a brief, as *amicus curiae*, granted. *Charles Morgan, Jr.*, on the motion.

Probable Jurisdiction Noted.

No. 1359. HUNTER *v.* ERICKSON, MAYOR OF AKRON, ET AL. Appeal from Sup. Ct. Ohio. Probable jurisdiction noted. *Bernard R. Roetzel* and *Robert L. Carter* for appellant. *William R. Baird* and *Alvin C. Vinopal* for appellees. Reported below: 12 Ohio St. 2d 116, 233 N. E. 2d 129.

No. 175, Misc. MATTIELLO *v.* CONNECTICUT. Appeal from App. Div., Cir. Ct. Conn. Motion for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted and case transferred to appellate docket. *Robert N. Grosby* for appellant. Reported below: 4 Conn. Cir. 55, 225 A. 2d 507.

Certiorari Granted. (See also No. 1328, *ante*, p. 593; No. 547, Misc., *ante*, p. 602; No. 731, Misc., *ante*, p. 605; No. 1099, Misc., *ante*, p. 602; and No. 1149, Misc., *ante*, p. 603.)

No. 1210. SKINNER ET AL. *v.* LOUISIANA. Sup. Ct. La. Certiorari granted. *G. W. Gill, Sr.*, and *Robert S. Link, Jr.*, for petitioners. *Jack P. F. Gremillion*, Attorney General of Louisiana, and *Jim Garrison* for respondent. Reported below: 251 La. 300, 204 So. 2d 370.

No. 1336. GREGORY ET AL. *v.* CITY OF CHICAGO. Sup. Ct. Ill. Certiorari granted. *Marshall Patner* for petitioners. *Raymond F. Simon* and *Marvin E. Aspen* for respondent. Reported below: 39 Ill. 2d 47, 233 N. E. 2d 422.

Certiorari Denied. (See also No. 229, *ante*, p. 600; No. 1352, *ante*, p. 601; and No. 1445, Misc., *ante*, p. 603.)

No. 1316. AYLWARD, TRUSTEE IN BANKRUPTCY *v.* BROADWAY VALENTINE CENTER, INC. C. A. 8th Cir. Certiorari denied. *Phineas Rosenberg* for petitioner. Reported below: 390 F. 2d 556.

No. 1325. ONE 1963 CHEVROLET PICKUP TRUCK ET AL. *v.* VIRGINIA. Sup. Ct. App. Va. Certiorari denied. *William B. Poff* for petitioners. Reported below: 208 Va. 506, 158 S. E. 2d 755.

No. 1332. ZARZOUR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *William B. McCollough, Jr.*, for petitioner. *Solicitor General Griswold, Assistant Attorney General Vinson*, and *Beatrice Rosenberg* for the United States. Reported below: 382 F. 2d 1015.

No. 1338. AMP INC. *v.* UNITED STATES. Ct. Cl. Certiorari denied. *William J. Keating* for petitioner. *Solicitor General Griswold* for the United States. *Graham W. McGowan* for Electronic Industries Assn., as *amicus curiae*, in support of the petition. Reported below: 182 Ct. Cl. 86, 389 F. 2d 448.

No. 1347. SUHL ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Harry A. Pines* for petitioners. *Solicitor General Griswold, Assistant Attorney General Vinson*, and *Philip R. Monahan* for the United States. Reported below: 390 F. 2d 547.

No. 1326. WOLDEN *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. *Eugene Gressman* for petitioner. Reported below: 255 Cal. App. 2d 798, 63 Cal. Rptr. 467.

No. 1337. CARTER *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. *Daniel C. Ahern* and *Kevin J. Gillogly* for petitioner. Reported below: 38 Ill. 2d 496, 232 N. E. 2d 692.

No. 1340. IN RE MARKEL. Super. Ct. Cal., County of Kern. Certiorari denied. *Thomas R. Davis* for petitioner.

No. 1341. PEACOCK ET AL. *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. *Charles J. McDonough* for petitioner Peacock. *Michael F. Dillon* for respondent.

No. 1343. O'KELLEY ET AL. *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. *Charles M. Gianola* for petitioners.

No. 1344. SALEM BUILDING TRADES COUNCIL, AFL–CIO *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 9th Cir. Certiorari denied. *James B. Griswold* for petitioner. *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli, Norton J. Come,* and *Gary Green* for respondent National Labor Relations Board. Reported below: 388 F. 2d 987.

No. 1299. BOOKER *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. THE CHIEF JUSTICE is of the opinion that certiorari should be granted. *Russell Shultz* for petitioner. *Robert C. Londerholm,* Attorney General of Kansas, and *Keith Sanborn* for respondent. Reported below: 200 Kan. 166, 434 P. 2d 801.

No. 1342. SUN PROTECTION CO. OF AMERICA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Jacob J. Kilimnik* for petitioner. *Solicitor General Griswold* for the United States. Reported below: 390 F. 2d 7.

No. 1384. MODERN PLASTIC MACHINERY CORP. *v.* FRANK W. EGAN & CO. ET AL.; and

No. 1408. MODERN PLASTIC MACHINERY CORP. *v.* FRANK W. EGAN & CO. ET AL. C. A. 3d Cir. Certiorari denied. *Ernest G. Montague* for petitioner in both cases. *William K. Kerr* and *David W. Plant* for respondents in both cases. Reported below: 387 F. 2d 319.

No. 1385. LONG ET UX. *v.* BRUNSWICK CORP. C. A. 4th Cir. Certiorari denied. *J. C. Long* for petitioners. *Robert L. Stern* and *Augustine T. Smythe* for respondent. Reported below: 392 F. 2d 337.

No. 1415. MAIER BREWING CO. ET AL. *v.* FLEISCHMANN DISTILLING CORP. ET AL. C. A. 9th Cir. Certiorari denied. *J. Albert Hutchinson* for petitioners. *Moses Lasky* for respondents. Reported below: 390 F. 2d 117.

No. 1405. WALKER *v.* ASSOCIATED PRESS. Ct. Civ. App. Tex., 2d Sup. Jud. Dist. Motion to use record in No. 150, October Term, 1966, granted. Certiorari denied. *William Andress, Jr.*, and *Clyde J. Watts* for petitioner. *William P. Rogers, Leo P. Larkin, Jr., Stanley Godofsky*, and *J. A. Gooch* for respondent. Reported below: 418 S. W. 2d 379.

No. 1223, Misc. STONE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg*, and *Robert G. Maysack* for the United States. Reported below: 385 F. 2d 713.

No. 1333. SOUTHERN ARIZONA BANK & TRUST CO. ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. MR. JUSTICE DOUGLAS, MR. JUSTICE STEWART, and MR. JUSTICE FORTAS are of the opinion that certiorari should be granted. *Scott P. Crampton* and *Stanley Worth* for petitioners. *Solicitor General Griswold, Assistant Attorney General Rogovin, Elmer J. Kelsey,* and *Robert I. Waxman* for the United States. Reported below: 181 Ct. Cl. 426, 386 F. 2d 1002.

No. 1345. INTERNATIONAL SALT CO. *v.* NEW JERSEY ET AL.; and

No. 1346. CAYUGA ROCK SALT CO. ET AL. *v.* NEW JERSEY ET AL. C. A. 3d Cir. Motions to defer consideration of these petitions and petitions for writs of certiorari denied. MR. JUSTICE BRENNAN took no part in the consideration or decision of these motions and petitions. *Lewis H. Van Dusen, Jr.,* for petitioner in No. 1345, and *Israel Packel* and *Samuel P. Orlando* for petitioner Cayuga Rock Salt Co. *Prospero DeBona* for respondent State of New Jersey in both cases. Reported below: 387 F. 2d 94.

No. 924, Misc. BLYDEN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States.

No. 1366, Misc. KEEGAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold* for the United States. Reported below: 385 F. 2d 260.

No. 1368, Misc. MOORE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States. Reported below: 389 F. 2d 90.

No. 1398, Misc. MAYES *v.* VINCENT ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 388 F. 2d 727.

No. 1422, Misc. EVANS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson, Beatrice Rosenberg,* and *Mervyn Hamburg* for the United States. Reported below: 387 F. 2d 160.

No. 1423, Misc. WHITE *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. *John A. McNiff* for petitioner. *John P. S. Burke* for respondent. Reported below: 353 Mass. 409, 232 N. E. 2d 335.

No. 1437, Misc. STAPLETON *v.* COHEN. Sup. Jud. Ct. Mass. Certiorari denied. *John E. Lonergan, Jr.,* for petitioner. *Everett A. Grant* for respondent. Reported below: 353 Mass. 53, 228 N. E. 2d 64.

No. 1459, Misc. STELLO *v.* STRAND ET AL. C. A. 9th Cir. Certiorari denied.

No. 1460, Misc. DODGE *v.* TURNER, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 1464, Misc. HOLLINGSHEAD *v.* WAINWRIGHT, WARDEN. Sup. Ct. Fla. Certiorari denied.

No. 1465, Misc. BRANCHE *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. *John T. Corrigan* and *Harvey R. Monck* for respondent.

No. 1469, Misc. HOSKINS *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 420 S. W. 2d 560.

No. 1476, Misc. ZARAGOZA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States. Reported below: 389 F. 2d 468.

No. 1490, Misc. PARSONS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States. Reported below: 386 F. 2d 837.

No. 1512, Misc. RODRIGUEZ *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 1521, Misc. REZA *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 1522, Misc. O'CONNELL *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied.

No. 1525, Misc. HOOPER *v.* WINGO, WARDEN. Ct. App. Ky. Certiorari denied.

No. 1527, Misc. CUMMINGS *v.* IOWA. Sup. Ct. Iowa. Certiorari denied.

No. 1529, Misc. OWENS *v.* SCAFATI, CORRECTIONAL SUPERINTENDENT. C. A. 1st Cir. Certiorari denied.

No. 1534, Misc. COLLOM *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Solicitor General Griswold* for the United States.

No. 1540, Misc. MAHURIN *v.* SWENSON, WARDEN. C. A. 8th Cir. Certiorari denied.

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No. 1538, Misc. SEVERA *v.* U. S. CIVIL SERVICE COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. *Solicitor General Griswold* for respondents.

No. 1539, Misc. BAILEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Philip R. Monahan* for the United States.

No. 1544, Misc. ZELL *v.* NELSON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 1545, Misc. MURRAY *v.* DICKSON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 1549, Misc. MEREDITH *v.* LANE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 1550, Misc. CLARK *v.* PAYNE. C. A. 3d Cir. Certiorari denied. Reported below: 390 F. 2d 647.

No. 1560, Misc. RHODES *v.* FITZHARRIS, TRAINING FACILITY SUPERINTENDENT. Sup. Ct. Cal. Certiorari denied.

No. 1562, Misc. DAVIDSON *v.* BOLES, WARDEN. C. A. 4th Cir. Certiorari denied.

No. 1565, Misc. HICKS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States. Reported below: 389 F. 2d 49.

No. 1582, Misc. VASQUEZ *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 256 Cal. App. 2d 342, 63 Cal. Rptr. 885.

No. 1571, Misc. McNeill *v.* Garrity, Warden. C. A. 4th Cir. Certiorari denied.

No. 1572, Misc. Collier *v.* Kentucky. Ct. App. Ky. Certiorari denied.

No. 1593, Misc. Barnes *v.* Alabama et al. C. A. 5th Cir. Certiorari denied.

No. 1594, Misc. Hardin *v.* Aetna Casualty & Surety Co. C. A. 5th Cir. Certiorari denied. *James E. Thompson* for respondent. Reported below: 384 F. 2d 718.

No. 1610, Misc. Fournier *v.* Ridolfi. Sup. Ct. N. J. Certiorari denied.

No. 1212, Misc. Strother *v.* United States. C. A. 5th Cir. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. *Solicitor General Griswold, Assistant Attorney General Vinson,* and *Beatrice Rosenberg* for the United States. Reported below: 387 F. 2d 385.

Rehearing Denied. (See also No. 191, October Term, 1962, *ante,* p. 604.)

No. 47. Ginsberg *v.* New York, 390 U. S. 629;

No. 699. Cameron et al. *v.* Johnson, Governor of Mississippi, et al., 390 U. S. 611;

No. 1162. Times Mirror Co. *v.* United States, 390 U. S. 712;

No. 1106, Misc. Miller *v.* United States, 390 U. S. 984; and

No. 1190, Misc. Ware *v.* Preston et al., 390 U. S. 1032. Petitions for rehearing denied.

JUNE 7, 1968.

Miscellaneous Order.

No. 701. IN RE WHITTINGTON, *ante*, p. 341. Application for bail or release on personal recognizance or other appropriate conditions presented to MR. JUSTICE STEWART, and by him referred to the Court, denied. It is ordered that the mandate of this Court issue forthwith to enable applicant to apply for release on bail or otherwise to the appropriate court of the State of Ohio. *Daniel A. Rezneck* for applicant. *E. Raymond Morehart* filed a memorandum in opposition.

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3. *Sherman Act—Musicians unions and orchestra leaders—Norris-LaGuardia Act.*—Musicians unions' involvement of orchestra leaders in the promulgation and enforcement of the unions' challenged regulations and bylaws does not create a combination or conspiracy in violation of the Sherman Act but falls within the exemption of the Norris-LaGuardia Act since the orchestra leaders were a "labor" group and parties to a "labor dispute." Federation of Musicians v. Carroll, p. 99.

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1. *Action for wrongful death—Parent of illegitimate child.*—Louisiana wrongful death statute as construed to bar recovery for damages to parent of an illegitimate child while allowing such recovery to the parent of a legitimate child violates the Equal Protection Clause of the Fourteenth Amendment, there being no rational basis for the distinction. Glona v. American Guarantee Co., p. 73.

CONSTITUTIONAL LAW—Continued.

2. *Action for wrongful death of mother—Illegitimate children.*—Louisiana statute as construed to deny right of recovery by illegitimate children creates an invidious discrimination contravening the Equal Protection Clause of the Fourteenth Amendment, since legitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother. Levy v. Louisiana, p. 68.

3. *Dual school system—"Freedom-of-choice" plan.*—The "freedom-of-choice" plan here is not acceptable; it has not dismantled the dual school system, it offers no real promise of achieving a unitary, nonracial system, and it has operated simply to burden students and their parents with a responsibility which *Brown* v. *Board of Education,* 349 U. S. 294, placed squarely on the School Board. Green v. County School Board, p. 430; Raney v. Board of Education, p. 443.

4. *Dual school system—"Free-transfer" plan.*—The "free-transfer" plan does not meet the Jackson, Tennessee, Board's "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." Monroe v. Board of Commissioners, p. 450.

III. First Amendment.

1. *Burning draft cards—Limitations on freedom of speech.*—When "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. United States v. O'Brien, p. 367.

2. *Peaceful picketing—Shopping center property.*—Peaceful picketing carried on in a location open generally to the public is, absent other factors involving the purpose or the manner of the picketing, protected by the First Amendment. Food Employees v. Logan Plaza, p. 308.

IV. Freedom of Speech and Press.

1. *False statements by teacher—Cause for dismissal.*—Teacher's false statements concerned issues then currently the subject of public attention and were neither shown nor could be presumed to have interfered with his teaching duties or the schools' general operation. The statements were thus entitled to the same protection as if they had been made by a member of the general public, and, absent proof that those false statements were knowingly or recklessly made, did not justify the Board of Education in dismissing appellant from public employment. Pickering v. Board of Education, p. 563.

CONSTITUTIONAL LAW—Continued.

2. *Public comment by teacher—Cause for dismissal.*—"[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." The teacher's interest as a citizen in making public comment must be balanced against the State's interest in promoting the efficiency of its employees' public services. Pickering v. Board of Education, p. 563.

3. *Sale of magazines—Vagueness.*—Former § 484–i of the New York Penal Law, which prohibited the sale of magazines "which would appeal to the lust of persons under the age of eighteen years or to their curiosity as to sex or to the anatomical differences between the sexes," is unconstitutionally vague and it is no answer to say that it was adopted for the salutary purpose of protecting children. Rabeck v. New York, p. 462.

V. Search and Seizure.

1. *Consent to search.*—A search cannot be justified as lawful on the basis of consent when that "consent" has been given only after the official conducting the search has asserted that he possesses a warrant; there is no consent under such circumstances. Bumper v. North Carolina, p. 543.

2. *Reasonable and probable cause—Search of automobile.*—Evidence was insufficient to justify the conclusion that officers before they began their warrantless seach of the car had "reasonable or probable cause" to believe that they would find an instrumentality of a crime or evidence pertaining to a crime. Petitioners' claim must be sustained that the gun was illegally seized and evidence concerning it should not have been admitted. Dyke v. Taylor Implement Co., p. 216.

VI. Self-Incrimination.

Interrogation of prisoner—Procedural safeguards.—Tax investigations, which frequently lead to criminal prosecution, are not immune from the requirements of *Miranda* v. *United States,* 384 U. S. 456, of warnings of the right to be silent and right to counsel to be given to person in custody, whether or not such custody is in connection with the case under investigation. Mathis v. United States, p. 1.

VII. Sixth Amendment.

1. *Confrontation Clause—Confession of codefendant.*—Because of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining petitioner's guilt, admission of codefendant's confession in joint trial violated petitioner's right of cross-examination secured

CONSTITUTIONAL LAW—Continued.

by the Confrontation Clause of the Sixth Amendment. *Delli Paoli* v. *United States*, 352 U. S. 232, overruled. Bruton v. United States, p. 123.

2. *Jurors opposed to capital punishment—Impartial jury.*—Petitioner has adduced no evidence to support his claim that a jury from which those who are opposed to capital punishment or have conscientious scruples against imposing the death penalty are excluded for cause is necessarily "prosecution prone," warranting reversal of his conviction for denial of his Sixth and Fourteenth Amendment rights to an impartial jury. Bumper v. North Carolina, p. 543.

3. *Jurors opposed to capital punishment—Questions of guilt and punishment.*—Neither on the basis of the record nor as a matter of judicial notice can it be concluded that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction; but it is self-evident that, in its distinct role as arbiter of the punishment to be imposed, this jury fell woefully short of that impartiality to which a defendant is entitled under the Sixth and Fourteenth Amendments. Witherspoon v. Illinois, p. 510.

4. *Trial by jury.*—Since trial by jury in criminal cases is fundamental to the American scheme of justice, the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which, were they tried in a federal court, would come within the Sixth Amendment's guarantee of trial by jury. Duncan v. Louisiana, p. 145.

5. *Trial by jury—Criminal contempt.*—Criminal contempt is a crime in every essential respect; serious criminal contempts are so nearly like other serious crimes that they are subject to the Constitution's jury trial provisions and only petty contempts may be tried without honoring demands for trial by jury. Bloom v. Illinois, p. 194.

6. *Trial by jury—Petty offense.*—In light of the maximum sentence which Tennessee statutes allowed, the criminal contempt for which petitioners were convicted was a "petty offense," to which the federal constitutional right of a jury trial does not extend. Dyke v. Taylor Implement Co., p. 216.

7. *Trial by jury—Serious contempts.*—When the legislature has not expressed a judgment as to the seriousness of an offense by fixing a maximum penalty, the best evidence as to the seriousness of the offense is the penalty imposed. Accordingly, petitioner, sentenced to a two-year prison term, was constitutionally entitled to a jury trial. Bloom v. Illinois, p. 194.

CONSTITUTIONAL LAW—Continued.

8. *Trial by jury—Serious crimes.*—The penalty authorized for a particular crime is of major relevance in determining whether it is a serious one subject to the mandates of the Sixth Amendment, and it is sufficient here, without defining the boundaries between petty offenses and serious crimes, to hold that a crime punishable by two years in prison is a serious crime and that appellant was entitled to a jury trial. Duncan v. Louisiana, p. 145.

CONTEMPT. See also **Constitutional Law**, VII, 5–7; **Sentences**, 2.

1. *Sixth Amendment—Trial by jury—Petty offense.*—In light of the maximum sentence which Tennessee statutes allowed, the criminal contempt for which petitioners were convicted was a "petty offense," to which the federal constitutional right of a jury trial does not extend. Dyke v. Taylor Implement Co., p. 216.

2. *Trial by jury—Serious criminal contempts.*—Criminal contempt is a crime in every essential respect; serious criminal contempts are so nearly like other serious crimes that they are subject to the Constitution's jury trial provisions and only petty contempts may be tried without honoring demands for trial by jury. Bloom v. Illinois, p. 194.

CONTRIBUTIONS. See **Bankruptcy Act**, 1.

CONTROL OF CORPORATION. See **Internal Revenue Code**, 1–2.

CORPORATE DISTRIBUTIONS. See **Internal Revenue Code**, 1–2.

COSTS. See **Federal Power Commission**, 1–3.

COSTS OF ADMINISTRATION. See **Bankruptcy Act**, 2.

COURTS. See **Antitrust Acts**, 1–2; **Constitutional Law**, II, 3; **Jurisdiction**; **Juvenile Delinquents**; **Mootness**; **Procedure**, 1–2, 4–6; **School Desegregation**, 1, 3.

COURTS OF APPEALS. See **Jurisdiction**; **Mootness**; **Procedure**, 1–2, 4.

CREDITORS. See **Bankruptcy Act**, 2.

CRIMINAL CONTEMPT. See **Constitutional Law**, VII, 5–7; **Contempt**, 1–2; **Sentences**, 2.

CRIMINAL LAW. See **Arrest**; **Confessions**; **Constitutional Law**, I; III, 1; IV, 3; V, 1–2; VI; VII, 1–8; **Contempt**, 1–2; **Habeas Corpus**; **Jurisdiction**; **Juvenile Delinquents**; **Mootness**; **Procedure**, 1–3, 6; **Search and Seizure**; **Sentences**, 1–3; **Trial by Jury**; **Universal Military Training and Service Act**; **Vagrancy**.

CRITICISM. See **Constitutional Law**, IV, 1–2.

CROSS-EXAMINATION. See **Constitutional Law**, VII, 1; **Procedure**, 3.

CURFEW. See **Vagrancy.**

CUSTODY. See **Constitutional Law**, VI; **Habeas Corpus**; **Jurisdiction**; **Mootness**; **Procedure**, 1; **Sentences**, 1.

CUSTOMS AGENTS. See **Arrest**; **Search and Seizure.**

DAMAGES. See **Bankruptcy Act**, 2.

DEATH PENALTY. See **Constitutional Law**, VII, 2–3; **Evidence**; **Juries**, 1–2.

DEBTOR AND CREDITORS. See **Bankruptcy Act**, 2.

DECLARATORY JUDGMENTS. See **Procedure**, 5.

DECREES. See **Antitrust Acts**, 1–2; **Procedure**, 4.

DELINQUENTS. See **Juvenile Delinquents**; **Procedure**, 6.

DEPOSITIONS. See **Federal Rules of Civil Procedure**; **Procedure**, 7–8.

DESEGREGATION. See **Constitutional Law**, II, 3–4; **School Desegregation**, 1–3.

DISCOVERY. See **Federal Rules of Civil Procedure**; **Procedure**, 7–8.

DISCRIMINATION. See **Constitutional Law**, II, 1–4; **School Desegregation**, 1–3.

DISMISSAL OF TEACHER. See **Constitutional Law**, IV, 1–2.

DISTRIBUTION OF PROPERTY. See **Internal Revenue Code**, 1–2.

DISTRICT COURTS. See **Antitrust Acts**, 1–2; **Constitutional Law**, II, 3; **Procedure**, 4; **School Desegregation**, 1, 3.

DIVERSITY ACTIONS. See **Constitutional Law**, II, 1; **Procedure**, 5.

DIVESTITURE OF CONTROL. See **Internal Revenue Code**, 1–2.

DIVIDENDS. See **Internal Revenue Code**, 1–2.

DOCUMENTARY EVIDENCE. See **Federal Rules of Civil Procedure**; **Procedure**, 7–8.

DRAFT CARDS. See **Constitutional Law**, III, 1; **Universal Military Training and Service Act.**

DRUGS. See **Arrest**; **Search and Seizure.**

DUAL SCHOOL SYSTEMS. See **Constitutional Law**, II, 3–4; **School Desegregation**, 1–3.

DUE PROCESS. See **Confessions**; **Constitutional Law**, I; III, 2; **Juvenile Delinquents**; **Picketing**; **Procedure**, 6; **Trespass.**

DWELLINGS. See **Arrest**; **Search and Seizure.**

ELECTIONS. See **Labor-Management Reporting and Disclosure Act**, 2–3; **Union Elections.**

ELIGIBILITY FOR OFFICE. See **Labor-Management Reporting and Disclosure Act**, 2–3; **Union Elections.**

EMPLOYEES' ANNUITY PLAN. See **Bankruptcy Act**, 1.

EMPLOYER AND EMPLOYEES. See **Antitrust Acts**, 3; **Bankruptcy Act**, 1; **Labor**, 1–2; **Labor-Management Reporting and Disclosure Act**, 1; **National Labor Relations Act.**

EQUAL PROTECTION OF THE LAWS. See **Constitutional Law**, II; **School Desegregation**, 1–3.

ERROR. See **Constitutional Law**, VII, 1; **Evidence**; **Juries**, 1.

EVIDENCE. See also **Confessions**; **Constitutional Law**, I; VII, 1; **Contempt**; **Federal Rules of Civil Procedure**; **Juries**, 1; **Jurisdiction**; **Labor-Management Reporting and Disclosure Act**, 2–3; **Mootness**; **Procedure**, 1, 7–8; **Union Elections**; **Vagrancy.**

Erroneously admitted—Harmless error.—Because the rifle, which was erroneously admitted into evidence, was plainly damaging against petitioner, its admission was not harmless error. Bumper v. North Carolina, p. 543.

EXERCISE OF RIGHTS. See **Internal Revenue Code**, 1–2.

EXHAUSTION OF PROCEDURES. See **Labor-Management Reporting and Disclosure Act**, 1; **National Labor Relations Act.**

EXPENSES OF ADMINISTRATION. See **Bankruptcy Act**, 2.

EXPIRATION OF SENTENCE. See **Jurisdiction**; **Mootness**; **Procedure**, 1.

EXTRAJUDICIAL STATEMENTS. See **Constitutional Law**, VII, 1; **Procedure**, 3.

FACULTY SEGREGATION. See **Constitutional Law**, II, 4; **School Desegregation**, 2.

FALSE STATEMENTS. See **Constitutional Law**, IV, 1.

FEDERAL COURTS. See **Jurisdiction**; **Mootness**; **Procedure**, 1.

FEDERAL OFFICERS. See **Arrest**; **Search and Seizure.**

FEDERAL POWER COMMISSION.

1. *Administrative discretion—Prices of natural gas—Zone of reasonableness.*—The FPC did not abuse its discretion in giving some weight to guideline and temporary prices, since those prices give some indication of cost trends; it properly discounted prices which were out of line, prices which may have included higher-than-normal allowance for risk, prices in settlement orders, and intrastate prices. The prices it established were within the zone of reasonableness within which it has rate-setting discretion. FPC v. Sunray DX Oil Co., p. 9.

2. *Pipeline proceedings—Public need—Abuse of discretion.*—The FPC did not abuse its discretion in deciding that the question whether the gas to be sold is actually needed by the public can be better dealt with in pipeline rather than producer proceedings, as much of the pertinent data is in the pipelines' possession and pipeline proceedings provide an adequate forum in which to confront aspects of the need issue. FPC v. Sunray DX Oil Co., p. 9.

3. *Refunds—Temporary certificates—In-line prices.*—In the exercise of its power to condition permanent certificates under § 7 (e) of the Natural Gas Act, the FPC may require producers to refund amounts collected under outstanding, unconditioned temporary certificates in excess of the finally established in-line price. FPC v. Sunray DX Oil Co., p. 9.

FEDERAL REGULATIONS. See **Constitutional Law**, III, 1; **Universal Military Training and Service Act.**

FEDERAL RULES OF CIVIL PROCEDURE. See also **Procedure**, 7–8.

Rule 56 (e)—Evidence of conspiracy—Burden of proof.—Lower courts correctly held that amended Rule 56 (e) placed upon petitioner the burden of producing evidence of conspiracy after respondent conclusively showed that the facts upon which petitioner relied to support his conspiracy allegation were not susceptible of the interpretation he sought to give them. First Nat. Bank v. Cities Service, p. 253.

FEDERAL-STATE RELATIONS. See **Procedure**, 5.

FEEDER SYSTEM. See **Constitutional Law**, II, 4; **School Desegregation**, 2.

FIFTH AMENDMENT. See **Constitutional Law**, VI.

FIRE DAMAGE. See **Bankruptcy Act**, 2.

FIRST AMENDMENT. See **Constitutional Law**, III–IV; **Picketing**; **Trespass**; **Universal Military Training and Service Act.**

FISHING RIGHTS. See **Indians**, 1–2.

FLORIDA. See **Vagrancy.**

FOURTEENTH AMENDMENT. See **Confessions**; **Constitutional Law**, I–II; III, 2; IV, 1–2; V; VII, 2–8; **Contempt**; **Evidence**; **Juries**, 1–2; **Juvenile Delinquents**; **Picketing**; **Procedure**, 3, 6; **School Desegregation**, 1–3; **Sentences**, 2–3; **Trespass**; **Trial by Jury.**

FOURTH AMENDMENT. See **Constitutional Law**, V; **Evidence**; **Juries**, 1.

"FREEDOM-OF-CHOICE" PLAN. See **Constitutional Law**, II, 3; **School Desegregation**, 1, 3.

FREEDOM OF SPEECH AND PRESS. See **Constitutional Law**, III–IV; **Universal Military Training and Service Act.**

"FREE-TRANSFER" PLAN. See **Constitutional Law**, II, 4; **School Desegregation**, 2.

FUTURE SENTENCES. See **Habeas Corpus**; **Sentences**, 1.

GAS. See **Federal Power Commission**, 1–3.

GOVERNMENTAL REGULATIONS. See **Constitutional Law**, III, 1; **Universal Military Training and Service Act.**

GRIEVANCES. See **Labor-Management Reporting and Disclosure Act**, 1; **National Labor Relations Act.**

GUIDELINE PRICES. See **Federal Power Commission**, 1–3.

GUILT. See **Constitutional Law**, VII, 2–3; **Evidence**; **Juries**, 1–2.

HABEAS CORPUS. See also **Jurisdiction**; **Mootness**; **Procedure**, 1; **Sentences**, 1.

Consecutive sentences—Challenge to sentence not yet served.—Prisoner serving consecutive sentences is "in custody" under any of them for purposes of 28 U. S. C. § 2241 (c)(3) and may in federal habeas corpus proceedings thereunder challenge the constitutionality of a sentence scheduled for future service. *McNally* v. *Hill*, 293 U. S. 131, overruled. Peyton v. Rowe, p. 54.

HARMLESS ERROR. See **Constitutional Law**, VII, 2; **Evidence**; **Juries**, 1.

HEARSAY. See **Constitutional Law**, VII, 1; **Procedure**, 3.

HUNTING RIGHTS. See **Indians**, 2.

ILLEGITIMATE CHILDREN. See **Constitutional Law**, II, 1–2.

ILLINOIS. See **Constitutional Law**, VII, 3, 5, 7; **Contempt**, 2; **Juries**, 2; **Sentences**, 2.

IMPARTIALITY. See **Constitutional Law**, VII, 3; **Juries**, 2.

INCOME. See **Internal Revenue Code**, 1–2.

IN CUSTODY. See **Habeas Corpus; Sentences**, 1.

INDIANS.

1. *Fishing rights—Treaty of Medicine Creek—Conservation measures.*—The State of Washington may in the interest of conservation regulate fishing by Indians "in common with" fishing by others, as set forth in the Treaty of Medicine Creek. Puyallup Tribe v. Dept. of Game, p. 392.

2. *Hunting and fishing rights—Treaty of Wolf River—Menominee Termination Act of 1954.*—The language in the Treaty of Wolf River "to be held as Indian lands are held" includes the right to fish and hunt, and the Menominee Tribe's hunting and fishing rights under the Treaty survived the Termination Act of 1954. Menominee Tribe v. United States, p. 404.

INDIGENT PRISONERS. See **Jurisdiction; Mootness; Procedure**, 1–2.

INJUNCTIONS. See **Constitutional Law**, II, 3; III, 2; V, 2; VII, 6; **Contempt**, 1; **Labor-Management Reporting and Disclosure Act**, 2–3; **Picketing; School Desegregation**, 1; **Trespass; Union Elections.**

"IN-LINE" RATES. See **Federal Power Commission**, 1–3.

INSOLVENCY. See **Bankruptcy Act**, 2.

INSTRUCTIONS TO JURY. See **Constitutional Law**, VII, 1; **Procedure**, 3.

INSTRUMENTALISTS. See **Antitrust Acts**, 3; **Labor**, 1–2.

INSURANCE. See **Bankruptcy Act**, 2.

INTERNAL REVENUE CODE.

1. *Corporate distribution—Rights offering to stockholders—Dividend.*—When a corporation sells corporate property to stockholders or their assignees at less than its fair value, thus diminishing the corporation's net worth, it is engaging in a "distribution of property," and such a sale results in a dividend to stockholders unless some specific exception applies. Commissioner v. Gordon, p. 83.

2. *Distribution of subsidiary's stock—Controlling interest—Divestiture.*—Distribution of 57% of wholly owned subsidiary's stock by rights offering to stockholders does not come within the exception to § 355, as the distribution did not transfer "all" the subsidiary's shares nor did it transfer "control" (defined in § 368 (c) as 80%). For an initial transfer of less than a controlling interest to be treated

INTERNAL REVENUE CODE—Continued.
as merely the first step in the divestiture of control it must be clearly identifiable as such and there must be a binding commitment to take the later steps, which was not the situation here. Commissioner v. Gordon, p. 83.

INTERROGATION. See **Confessions; Constitutional Law,** I; VI.

INVESTIGATIONS. See **Confessions; Constitutional Law,** I; VI.

IRANIAN OIL. See **Federal Rules of Civil Procedure; Procedure,** 7–8.

JACKSON, TENNESSEE. See **Constitutional Law,** II, 4; **School Desegregation,** 2.

JOB COMPETITION. See **Antitrust Acts,** 3; **Labor,** 1–2.

JOINT TRIAL. See **Constitutional Law,** VII, 1; **Procedure,** 3.

JUDGES. See **Procedure,** 4.

JUDGE'S INSTRUCTIONS. See **Constitutional Law,** VII, 1; **Procedure,** 3.

JUDGMENTS. See **Antitrust Acts,** 1–2.

JUDICIAL REVIEW. See **Constitutional Law,** II, 3; **Labor-Management Reporting and Disclosure Act,** 1; **National Labor Relations Act; School Desegregation,** 1, 3.

JURIES. See also **Constitutional Law,** VII, 1–3; **Evidence; Procedure,** 3.

1. *Jurors opposed to capital punishment—Impartial jury.*—Petitioner has adduced no evidence to support his claim that a jury from which those who are opposed to capital punishment or have conscientious scruples against imposing the death penalty are excluded for cause is necessarily "prosecution prone," warranting reversal of his conviction for denial of his Sixth and Fourteenth Amendment rights to an impartial jury. Bumper v. North Carolina, p. 543.

2. *Jurors opposed to capital punishment—Questions of guilt and punishment.*—Neither on the basis of the record nor as a matter of judicial notice can it be concluded that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction; but it is self-evident that, in its distinct role as arbiter of the punishment to be imposed, this jury fell woefully short of that impartiality to which a defendant is entitled under the Sixth and Fourteenth Amendments. Witherspoon v. Illinois, p. 510.

JURISDICTION. See also **Mootness; Procedure,** 1.

Federal habeas corpus—Expiration of sentence—Mootness.—Because of the "disabilities or burdens [which] may flow from" petitioner's conviction, he has "a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him," and under the federal habeas corpus statutory scheme, once federal jurisdiction has attached in the District Court, it is not defeated by petitioner's release before completion of the proceedings on the application. Carafas v. LaVallee, p. 234.

JURY TRIAL. See **Constitutional Law,** VII, 4–8; **Contempt,** 1–2; **Sentences,** 2–3; **Trial by Jury.**

JUST AND REASONABLE RATES. See **Federal Power Commission,** 1–3.

JUVENILE COURTS. See **Juvenile Delinquents; Procedure,** 6.

JUVENILE DELINQUENTS. See also **Procedure,** 6.

Procedure—Subsequent Supreme Court opinion—Remand for reconsideration.—Since the Ohio courts have not had the opportunity to assess the impact of *In re Gault,* 387 U. S. 1, on juvenile petitioner's constitutional claims, the judgment is vacated and remanded for reconsideration in light of *Gault.* Upon remand the court may also consider the impact, if any, on petitioner's questions concerning the intervening Juvenile Court order requiring him to face trial in the adult courts. In re Whittington, p. 341.

KUWAIT OIL. See **Federal Rules of Civil Procedure; Procedure,** 7–8.

LABOR. See also **Antitrust Acts,** 3; **Bankruptcy Act,** 1; **Constitutional Law,** III, 2; **Labor-Management Reporting and Disclosure Act,** 1–3; **National Labor Relations Act; Picketing; Trespass; Union Elections.**

1. *Musicians unions and orchestra leaders—Labor dispute—Sherman Act.*—Musicians unions' involvement of orchestra leaders in the promulgation and enforcement of the unions' challenged regulations and bylaws does not create a combination or conspiracy in violation of the Sherman Act but falls within the exemption of the Norris-LaGuardia Act since the orchestra leaders were a "labor" group and parties to a "labor dispute." Federation of Musicians v. Carroll, p. 99.

2. *Orchestra leaders—Parties to a labor dispute—Norris-LaGuardia Act.*—The District Court correctly stated the criterion for determining that orchestra leaders were a "labor" group and parties to a "labor dispute" as the "presence of a job or wage competition or some other economic relationship affecting legitimate

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LABOR—Continued.

union interests between the union members and the independent contractors. If such a relationship existed the independent contractors were a 'labor' group and party to a labor dispute under the Norris-LaGuardia Act." Federation of Musicians v. Carroll, p. 99.

LABOR DISPUTES. See **Antitrust Acts**, 3; **Constitutional Law**, III, 2; **Contempt**, 1; **Labor**, 1–2.

LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT. See also **National Labor Relations Act**; **Union Elections.**

1. *Union members' grievances—Hearing procedures.*—Though § 101 (a) (4) of the Act authorizes union hearing procedures for processing members' grievances, provided those procedures do not consume more than four months, a court or agency may consider whether a particular procedure is "reasonable" and entertain the complaint even though those procedures have not been exhausted. NLRB v. Marine Workers, p. 418.

2. *Union's bylaws—Union elections—Qualifications for candidates.*—The union's bylaw which limited eligibility for major elective offices to union members who hold or have previously held elective office, measured against the Act's requirement of "free and democratic" union elections, is not a "reasonable qualification" within the meaning of § 401 (e) of the Act. Wirtz v. Hotel Employees, p. 492.

3. *Violation of § 401—Affecting the outcome of the union election.*—A proved violation of § 401 of the Act establishes a prima facie case that the outcome may have been affected and may be met by evidence supporting a finding to the contrary. The factors the District Court relied on were pure conjecture and none of those factors is tangible evidence against the reasonable possibility that the wholesale exclusion of members as candidates did affect the outcome of the election. Wirtz v. Hotel Employees, p. 492.

LEADER'S FEE. See **Antitrust Acts**, 3; **Labor**, 1–2.

LEGITIMACY. See **Constitutional Law**, II, 1–2.

LESSER INCLUDED OFFENSES. See **Constitutional Law**, III, 1; **Universal Military Training and Service Act.**

LETTERS TO NEWSPAPERS. See **Constitutional Law**, IV, 1–2.

LOUISIANA. See **Constitutional Law**, II, 1–2; VII, 4, 8; **Sentences**, 3; **Trial by Jury.**

MAGAZINES. See **Constitutional Law**, IV, 3.

MARKET DOMINATION. See **Antitrust Acts**, 1–2.

MAXIMUM PRICES. See **Federal Power Commission**, 1–3.

MENOMINEE TERMINATION ACT OF 1954. See **Indians**, 2.

MEXICO. See **Arrest; Search and Seizure.**

MINIMUM EMPLOYMENT QUOTAS. See **Antitrust Acts**, 3; **Labor**, 1–2.

MINIMUM WAGES. See **Antitrust Acts**, 3; **Labor**, 1–2.

MINORS. See **Constitutional Law**, IV, 3.

MISDEMEANORS. See **Constitutional Law**, VII, 4, 8; **Sentences**, 3; **Trial by Jury; Vagrancy.**

MODIFICATION OF DECREE. See **Antitrust Acts**, 1–2.

MONOPOLY. See **Antitrust Acts**, 1–2.

MOOTNESS. See also **Jurisdiction; Procedure**, 1.

Expiration of criminal sentence—Appeals—Federal habeas corpus.—Because of the "disabilities or burdens [which] may flow from" petitioner's conviction, he has "a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him," and under the federal habeas corpus statutory scheme, once federal jurisdiction has attached in the District Court, it is not defeated by petitioner's release before completion of the proceedings on the application. Carafas v. LaVallee, p. 234.

MORALS. See **Constitutional Law, IV**, 3.

MOTHER AND CHILD. See **Constitutional Law**, II, 1–2.

MOTIONS FOR SUMMARY JUDGMENT. See **Federal Rules of Civil Procedure; Procedure**, 7–8.

MURDER. See **Confessions; Constitutional Law**, I; VII, 3; **Juries**, 2; **Juvenile Delinquents; Procedure**, 6.

MUSICIANS UNIONS. See **Antitrust Acts**, 3; **Labor**, 1–2.

NARCOTICS. See **Arrest; Search and Seizure.**

NATIONAL LABOR RELATIONS ACT. See also **Labor-Management Reporting and Disclosure Act**, 1.

Protected activity—Union member's grievance—Expulsion from union.—Union member's charge that he was discriminated against because he had engaged in "protected activity" constituted a sufficient allegation of impairment of § 7 rights; and where a grievance does not concern an internal union matter, but touches part of the public domain covered by the Act, failure to resort to intra-union grievance procedure before filing unfair labor practice complaint with the NLRB is not ground for expulsion from the union. NLRB v. Marine Workers, p. 418.

NATURAL GAS ACT. See **Federal Power Commission**, 1–3.

NEGLIGENCE. See **Bankruptcy Act**, 2.

NEGROES. See **Constitutional Law**, II, 3–4; **School Desegregation**, 1–3.

NEW KENT COUNTY. See **Constitutional Law**, II, 3; **School Desegregation**, 3.

NEW MEXICO. See **Procedure**, 5.

NEWSPAPERS. See **Constitutional Law**, IV, 1–2.

NEW YORK. See **Constitutional Law**, IV, 3; **Jurisdiction**; **Mootness**; **Procedure**, 1.

NISQUALLY RIVER. See **Indians**, 1.

NONPOSSESSION REGULATION. See **Constitutional Law**, III, 1; **Universal Military Training and Service Act.**

NORRIS-LaGUARDIA ACT. See **Antitrust Acts**, 3; **Labor**, 1–2.

NORTH CAROLINA. See **Constitutional Law**, V, 1; VII, 2; **Evidence**; **Juries**, 1.

NOTICE. See **Arrest**; **Search and Seizure.**

NOVEL QUESTION. See **Procedure**, 5.

OBSCENITY. See **Constitutional Law**, IV, 3.

OHIO. See **Juvenile Delinquents**; **Procedure**, 6.

OIL COMPANIES. See **Federal Rules of Civil Procedure**; **Procedure**, 7–8.

ORCHESTRA LEADERS. See **Antitrust Acts**, 3; **Labor**, 1–2.

PARCEL PICKUP AREAS. See **Constitutional Law**, III, 2; **Picketing**; **Trespass.**

PARENT AND CHILD. See **Constitutional Law**, II, 1–2.

PARKING AREAS. See **Constitutional Law**, III, 2; **Picketing**; **Trespass.**

PENALTIES. See **Constitutional Law**, VII, 5, 7; **Contempt**, 2; **Sentences**, 2.

PERIODICALS. See **Constitutional Law**, IV, 3.

PERMANENT CERTIFICATES. See **Federal Power Commission**, 1–3.

PETTY CONTEMPTS. See **Constitutional Law**, VII, 5–7; **Contempt**, 1–2; **Sentences**, 2.

PETTY OFFENSES. See **Constitutional Law**, VII, 6; **Contempt**, 1; **Trial by Jury.**

PICKETING. See also **Constitutional Law,** III, 2; **Trespass.**

Shopping center property—First Amendment.—Peaceful picketing carried on in a location open generally to the public is, absent other factors involving the purpose or the manner of the picketing, protected by the First Amendment. Food Employees v. Logan Plaza, p. 308.

PIPELINES. See **Federal Power Commission,** 1–3.

POLICE INTERROGATION. See **Confessions; Constitutional Law,** I.

POLICY STATEMENT. See **Federal Power Commission,** 1–3.

POSTAL ROBBERY. See **Constitutional Law,** VII, 1; **Procedure,** 3.

PREMATURITY. See **Habeas Corpus; Sentences,** 1.

PRETRIAL DISCOVERY. See **Federal Rules of Civil Procedure; Procedure,** 7–8.

PRICE-FIXING. See **Antitrust Acts,** 3; **Labor,** 1–2.

PRICES. See **Federal Power Commission,** 1–3.

PRIORITIES. See **Bankruptcy Act,** 2.

PRISONERS. See **Constitutional Law,** VI; **Habeas Corpus; Jurisdiction; Mootness; Procedure,** 1–2; **Sentences,** 1.

PRIVATE ANTITRUST SUITS. See **Federal Rules of Civil Procedure; Procedure,** 7–8.

PROBABLE CAUSE. See **Constitutional Law,** VII, 6; **Contempt,** 1.

PROBATION. See **Vagrancy.**

PROCEDURE. See also **Constitutional Law,** II, 1–2; VI; VII, 1, 4–5, 7; **Contempt,** 2; **Federal Rules of Civil Procedure; Habeas Corpus; Jurisdiction; Juvenile Delinquents; Labor-Management Reporting and Disclosure Act,** 1; **Mootness; National Labor Relations Act; Sentences,** 1–2; **Trial by Jury.**

1. *Appeals—Certificate of probable cause.*—Where a certificate of probable cause has been granted, the court of appeals must allow an appeal *in forma pauperis* (assuming a requisite showing of poverty), and must consider the appeal on its merits, and must include in its order enough to demonstrate the basis for its action, as this Court held in *Nowakowski* v. *Maroney,* 386 U. S. 542, which, though decided after the Court of Appeals' dismissal of petitioner's appeal, governs this case which had not been concluded at the time of that decision. Carafas v. LaVallee, p. 234.

PROCEDURE—Continued.

2. *Appeals—Certificate of probable cause—Summary procedure.*—When an appeal possesses sufficient merit to warrant a certificate of probable cause, appellant must be afforded adequate opportunity to address the merits, and if a summary procedure is adopted he must be informed, by rule or otherwise, that his opportunity will or may be limited. Garrison v. Patterson, p. 464.

3. *Confession of codefendant—Joint trial—Instructions to jury.*—Because of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining petitioner's guilt, admission of codefendant's confession in joint trial violated petitioner's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment. *Delli Paoli* v. *United States*, 352 U. S. 232, overruled. Bruton v. United States, p. 123.

4. *District courts — Three-judge courts — Appeals.* — Where the district judge in whose court the case was originally filed adopts as his own a three-judge court's determination that the claim was not one to be heard by a three-judge court and that the relief sought was not warranted, an appeal lies to the Court of Appeals and not to this Court, and therefore the judgment is vacated and remanded to permit entry of a fresh decree from which a timely appeal may be taken to the Court of Appeals. Wilson v. City of Port Lavaca, p. 352.

5. *Diversity suit—Court of Appeals' refusal to stay its action—State law issue.*—The Court of Appeals erred in refusing to stay its action in this diversity case, as the crucial state law issue involved is of vital concern, is truly novel, will have to be resolved eventually in the New Mexico courts, and a declaratory judgment action is actually pending there. Kaiser Steel Corp. v. W. S. Ranch Co., p. 593.

6. *Juvenile delinquent — Subsequent Supreme Court opinion — Remand for reconsideration.*—Since the Ohio courts have not had the opportunity to assess the impact of *In re Gault*, 387 U. S. 1, on juvenile petitioner's constitutional claims, the judgment is vacated and remanded for reconsideration in light of *Gault*. Upon remand the court may also consider the impact, if any, on petitioner's questions concerning the intervening Juvenile Court order requiring him to face trial in the adult courts. In re Whittington, p. 341.

7. *Motion for summary judgment—Extended private antitrust action—Genuine issue for trial.*—On the facts shown summary judgment was correctly awarded to respondent in this extended private antitrust action, since petitioner was unable to show sufficient material facts to raise genuine issue for trial of his case against

PROCEDURE—Continued.

respondent. Petitioner's position that Cities' failure to deal with him (the one fact he has shown) is sufficiently probative of conspiracy to withstand summary judgment cannot be supported where no interest of Cities was shown to parallel the interests of the other defendants. First Nat. Bank v. Cities Service, p. 253.

8. *Motion for summary judgment—Petitioner's access to information.*—Trial judge's orders in this extended private antitrust suit for treble damages prior to the rendition of summary judgment were proper and did not place unfair limits on petitioner's access to relevant information, as petitioner's allegations of respondent Cities' links to the conspiracy were refuted, petitioner was permitted to take depositions from Cities officials, petitioner admitted that Cities was in a different position from the other defendants, and the period to which petitioner's documentary requests pertain is one largely related to activities outside the period covered by this phase of the lawsuit. First Nat. Bank v. Cities Service, p. 253.

PRODUCERS. See **Federal Power Commission**, 1–3.

PROMPT ADJUDICATION. See **Habeas Corpus; Sentences**, 1.

PROPERTY RIGHTS. See **Constitutional Law**, III, 2; **Picketing; Trespass.**

PUBLICATIONS. See **Constitutional Law**, IV, 1–3.

PUBLIC EMPLOYMENT. See **Constitutional Law**, IV, 1–2.

PUBLIC NEED. See **Federal Power Commission**, 1–3.

PUBLIC PROPERTY. See **Constitutional Law**, III, 2; **Picketing; Trespass.**

PUBLIC SCHOOLS. See **Constitutional Law**, II, 3–4; **School Desegregation**, 1–3.

PUBLIC USE. See **Procedure**, 5.

PUNISHMENT. See **Constitutional Law**, VII, 2–3; **Evidence; Juries**, 1–2.

PUPIL PLACEMENT LAW. See **Constitutional Law**, II, 4; **School Desegregation**, 2.

PUYALLUP RIVER. See **Indians**, 1.

QUALIFICATIONS FOR OFFICE. See **Labor-Management Reporting and Disclosure Act**, 2–3; **Union Elections.**

RACIAL DISCRIMINATION. See **Constitutional Law**, II, 3–4; **School Desegregation**, 1–3.

RATES. See **Federal Power Commission**, 1–3.

REASONABLE RATES. See **Federal Power Commission**, 1–3.

RECEIVERS. See **Bankruptcy Act**, 2.

RECKLESS DRIVING. See **Constitutional Law**, VII, 6; **Contempt**, 1.

RE-ENACTMENT OF CRIME. See **Confessions**; **Constitutional Law**, I.

REFUNDS. See **Federal Power Commission**, 3.

REGISTRATION CERTIFICATES. See **Constitutional Law**, III, 1; **Universal Military Training and Service Act.**

RELIEF. See **Antitrust Acts**, 1–2; **Procedure**, 4.

RELIGIOUS SCRUPLES. See **Constitutional Law**, VII, 2–3; **Juries**, 1–2.

REMAND. See **Juvenile Delinquents**; **Procedure**, 6.

RESERVATION LANDS. See **Indians**, 2.

RESPONDEAT SUPERIOR. See **Bankruptcy Act**, 2.

RIFLES. See **Constitutional Law**, VII, 6; **Contempt**, 1.

RIGHT OF CONFRONTATION. See **Constitutional Law**, VII, 1; **Procedure**, 3.

RIGHTS OFFERINGS. See **Internal Revenue Code**, 1–2.

RIGHT TO BE SILENT. See **Constitutional Law**, VI.

RIGHT TO COUNSEL. See **Constitutional Law**, VI.

RIGHT TO JURY TRIAL. See **Constitutional Law**, VII, 4–8; **Contempt**, 1–2; **Sentences**, 2–3; **Trial by Jury.**

RULES OF CIVIL PROCEDURE. See **Federal Rules of Civil Procedure**; **Procedure**, 7–8.

SALARIES. See **Bankruptcy Act**, 1.

SALE OF RIGHTS. See **Internal Revenue Code**, 1–2.

SALES. See **Federal Power Commission**, 1–3.

SALMON FISHING. See **Indians**, 1.

SCHOOL BOARDS. See **Constitutional Law**, II, 3–4; **School Desegregation**, 1–3.

SCHOOL DESEGREGATION. See also **Constitutional Law**, II, 3–4.

1. *"Freedom-of-choice" plan—Responsibility of District Court.*— The District Court's dismissal of the complaint was an improper exercise of discretion and inconsistent with its responsibility under

SCHOOL DESEGREGATION—Continued.

Brown v. *Board of Education*, 349 U. S. 294, to retain jurisdiction "to insure (1) that a constitutionally acceptable plan is adopted, and (2) that it is operated in a constitutionally permissible fashion so that the goal of a desegregated, nonracially operated school system is rapidly and finally achieved." Raney v. Board of Education, p. 443.

2. *"Free-transfer" plan—School Board's responsibility.*—Since it has not been shown that the "free-transfer" plan will further rather than delay conversion to a unitary, nonracial system, it is unacceptable, and the Board must formulate a new plan which promises realistically to convert promptly to a unitary, nondiscriminatory school system. Monroe v. Board of Commissioners, p. 450.

3. *Plan of desegregation—School Board's burden—District Court's obligation.*—Burden is on School Board to provide a plan that promises realistically to work *now*, and a plan that at this late date fails to provide meaningful assurance of prompt and effective disestablishment of a dual system is intolerable. The District Court's obligation is to assess the effectiveness of the plan and to retain jurisdiction until it is clear that state-imposed segregation has been completely removed. Green v. County School Board, p. 430.

SCHOOLS. See **Constitutional Law**, II, 3–4; **School Desegregation**, 1–3.

SCRUPLES. See **Constitutional Law**, VII, 2–3; **Evidence**; **Juries**, 1–2.

SEARCH AND SEIZURE. See also **Arrest**; **Constitutional Law**, V, 1–2; VII, 2; **Contempt**, 1; **Evidence**; **Juries**, 1.

Warrantless search—Unannounced intrusion—Opening unlocked door.—Validity of entry of federal officer to effect warrantless arrest "must be tested by criteria identical to those embodied in" 18 U. S. C. § 3109, which is a codification of the common-law rule of announcement and basically proscribes an unannounced intrusion into a dwelling, including opening a closed but unlocked door. Sabbath v. United States, p. 585.

SECRETARY OF LABOR. See **Labor-Management Reporting and Disclosure Act**, 2–3; **Union Elections.**

SEGREGATION. See **Constitutional Law**, II, 3–4; **School Desegregation**, 1–3.

SELECTIVE SERVICE REGISTRATION CERTIFICATES. See **Constitutional Law**, III, 1; **Universal Military Training and Service Act.**

SELF-INCRIMINATION. See **Constitutional Law**, VI.

SENTENCES. See also **Constitutional Law**, VII, 4–5, 7–8; **Contempt**, 2; **Habeas Corpus**; **Jurisdiction**; **Mootness**; **Procedure**, 1; **Trial by Jury.**

1. *Consecutive sentences—Constitutional challenge—Habeas corpus.*—Prisoner serving consecutive sentences is "in custody" under any of them for purposes of 28 U. S. C. § 2241 (c) (3) and may in federal habeas corpus proceedings thereunder challenge the constitutionality of a sentence scheduled for future service. *McNally* v. *Hill*, 293 U. S. 131, overruled. Peyton v. Rowe, p. 54.

2. *Trial by jury—Relevance of sentence—Criminal contempt.*—When the legislature has not expressed a judgment as to the seriousness of an offense by fixing a maximum penalty, the best evidence as to the seriousness of the offense is the penalty imposed. Accordingly, petitioner, sentenced to a two-year prison term, was constitutionally entitled to a jury trial. Bloom v. Illinois, p. 194.

3. *Trial by jury—Serious crimes—Relevance of sentence.*—The penalty authorized for a particular crime is of major relevance in determining whether it is a serious one subject to the mandates of the Sixth Amendment, and it is sufficient here, without defining the boundaries between petty offenses and serious crimes, to hold that a crime punishable by two years in prison is a serious crime and that appellant was entitled to a jury trial. Duncan v. Louisiana, p. 145.

SERIOUS CRIMES. See **Constitutional Law**, VII, 4, 8; **Sentences**, 3; **Trial by Jury.**

SET NETS. See **Indians**, 1.

SEX MATERIAL. See **Constitutional Law**, IV, 3.

SHERMAN ACT. See **Antitrust Acts**, 1–3; **Labor**, 1–2.

SHOE MACHINERY. See **Antitrust Acts**, 1–2.

SHOPPING CENTERS. See **Constitutional Law**, III, 2; **Picketing**; **Trespass.**

SIDEMEN. See **Antitrust Acts**, 3; **Labor**, 1–2.

SIMPLE BATTERY. See **Constitutional Law**, VII, 4, 8; **Sentences**, 3; **Trial by Jury.**

SIXTH AMENDMENT. See **Constitutional Law**, VII; **Contempt**, 1–2; **Evidence**; **Juries**, 1–2; **Procedure**, 3; **Sentences**, 2–3; **Trial by Jury.**

SPINOFFS. See **Internal Revenue Code**, 1–2.

STATEMENTS. See **Confessions**; **Constitutional Law**, I; VI; VII, 1; **Procedure**, 3.

STATE PRISONERS. See **Jurisdiction; Mootness; Procedure,** 1.

STAYS. See **Procedure,** 5.

STOCKHOLDERS. See **Internal Revenue Code,** 1–2.

SUBLEADERS. See **Antitrust Acts,** 3; **Labor,** 1–2.

SUMMARY JUDGMENT. See **Federal Rules of Civil Procedure; Procedure,** 7–8.

SUMMARY PROCEDURE. See **Procedure,** 2.

SUPERMARKETS. See **Constitutional Law,** III, 2; **Picketing; Trespass.**

SURVIVING CHILD. See **Constitutional Law,** II, 2.

TAXES. See **Internal Revenue Code,** 1–2.

TAX INVESTIGATIONS. See **Constitutional Law,** VI.

TEACHERS. See **Constitutional Law,** IV, 1–2.

TEMPORARY CERTIFICATES. See **Federal Power Commission,** 1–3.

TENNESSEE. See **Constitutional Law,** II, 4; V, 2; VII, 6; **Contempt,** 1; **School Desegregation,** 2.

TERMINATION ACT OF 1954. See **Indians,** 2.

THREE-JUDGE COURTS. See **Procedure,** 4.

TORT CLAIMS. See **Bankruptcy Act,** 2.

TREATY OF MEDICINE CREEK. See **Indians,** 1.

TREATY OF WOLF RIVER. See **Indians,** 2.

TREBLE DAMAGES. See **Federal Rules of Civil Procedure; Procedure,** 7–8.

TRESPASS. See also **Constitutional Law,** III, 2; **Picketing; Procedure,** 5.

Picketing—Shopping center property—First Amendment.—Since the shopping center serves as the community business block "and is freely accessible and open to the people in the area and those passing through," the State may not delegate the power, through the use of trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put. Food Employees v. Logan Plaza, p. 308.

TRIAL. See **Juvenile Delinquents; Procedure,** 6.

TRIAL BY JURY. See also **Constitutional Law,** VII, 2–8; **Contempt,** 1–2; **Evidence; Juries,** 1–2; **Sentences,** 2–3.

Sixth Amendment—Applicable in state criminal trials.—Since trial by jury in criminal cases is fundamental to the American scheme of justice, the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which, were they tried in a federal court, would come within the Sixth Amendment's guarantee of trial by jury. Duncan v. Louisiana, p. 145.

TRIBAL LANDS. See **Indians,** 2.

TRUSTEES. See **Bankruptcy Act,** 2.

UNANNOUNCED INTRUSION. See **Arrest; Search and Seizure.**

UNFAIR LABOR PRACTICE. See **Labor-Management Reporting and Disclosure Act,** 1; **National Labor Relations Act.**

UNION BYLAWS. See **Labor-Management Reporting and Disclosure Act,** 2–3; **Union Elections.**

UNION ELECTIONS. See also **Labor-Management Reporting and Disclosure Act,** 2–3.

Qualifications for candidates—Union's bylaws—Labor-Management Reporting and Disclosure Act.—The union's bylaw, which limited eligibility for major elective offices to union members who hold or have previously held elective office, measured against the Act's requirement of "free and democratic" union elections, is not a "reasonable qualification" within the meaning of § 401 (e) of the Act. Wirtz v. Hotel Employees, p. 492.

UNIONS. See **Antitrust Acts,** 3; **Constitutional Law,** III, 2; **Labor,** 1–2; **Labor-Management Reporting and Disclosure Act,** 1–3; **National Labor Relations Act; Picketing; Trespass.**

UNIVERSAL MILITARY TRAINING AND SERVICE ACT. See also **Constitutional Law,** III, 1.

Burning draft cards—First Amendment.—A governmental regulation is sufficiently justified if it is within the constitutional power of the government (here the right to raise and support armies) and furthers an important governmental interest unrelated to the suppression of free expression, and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to that interest. The 1965 Amendment to 50 U. S. C. App. § 462 (b) (3), which plainly does not abridge free speech on its face, meets these requirements, and is constitutional as applied. United States v. O'Brien, p. 367.

UNLOCKED DOORS. See **Arrest; Search and Seizure.**

VAGRANCY.

"Wandering or strolling"—Lack of evidence—Florida vagrancy law.—Fact that appellant was out long after curfew hour of his probation may be held to establish the no "lawful purpose or object" ingredient of Florida vagrancy statute, but judgment cannot stand since there was no evidence establishing the "wandering or strolling" ingredient. Johnson v. Florida, p. 596.

VAGUENESS. See **Constitutional Law,** III, 1.

VENIREMEN. See **Constitutional Law,** VII, 2–3; **Evidence; Juries,** 1–2.

VIRGINIA. See **Constitutional Law,** II, 3; **School Desegregation,** 3.

VOLUNTARINESS. See **Confessions; Constitutional Law,** I.

WAGES. See **Antitrust Acts,** 3; **Bankruptcy Act,** 1; **Labor,** 1–2.

WANDERING OR STROLLING. See **Vagrancy.**

WARNINGS. See **Constitutional Law,** VI.

WARRANTLESS SEARCH. See **Arrest; Constitutional Law,** V, 1–2; **Contempt,** 1; **Search and Seizure.**

WARRANTS. See **Constitutional Law,** V, 1; VII, 2; **Evidence; Juries,** 1.

WASHINGTON. See **Indians,** 1.

WATER RIGHTS. See **Procedure,** 5.

WISCONSIN. See **Indians,** 2.

WORDS.

"In custody."—28 U. S. C. § 2241 (c)(3). Peyton v. Rowe, p. 54.

WORKABLE COMPETITION. See **Antitrust Acts,** 1–2.

WORKMEN. See **Bankruptcy Act,** 1.

WRONGFUL DEATH. See **Constitutional Law,** II, 1–2.

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